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REPORTS
OF
DECISIONS IN CRIMINAL CASES

MADE
AT TERM, AT CHAMBERS,
AND IN THE
COURTS OF OYER AND TERMINER,
OF THE
STATE OF NEW YORK.

BY AMASA J. PARKER, LL. D.

VOL. IV.

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OF THE

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SINCE THE ADOPTION OF THE CONSTITUTION OF 1846.

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BENJAMIN F. GREEN,
MARTIN GROVER,
NOAH DAVIS, JR.

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DECISIONS
IN
CRIMINAL CASES
IN THE
STATE OF NEW YORK.

SUPREME COURT. New York General Term, June, 1857. *Mitchell, Roosevelt and Peabody, Justices.*

THE PEOPLE *v.* JOHN McCORMACK.

On a complaint against a person as a disorderly person, for neglecting to support his wife, evidence showing that the parties had for many years lived as husband and wife, is competent to prove the marriage.

It is not the province of a writ of *habeas corpus* to review errors in an adjudication of an inferior tribunal, nor the sufficiency of evidence before it; it is only to ascertain whether there was jurisdiction to pronounce the sentence of commitment, and whether the commitment is in due form.

Forms of writ of *certiorari* to review, before the General Term, proceedings on *habeas corpus*, before Judge at Chambers, of affidavit on which it was allowed, and of return thereto.

Also forms of *habeas corpus* and *certiorari* issued by Judge at Chambers, and of petitions on which they were allowed, and returns thereto.

THIS case came before the General Term on a *certiorari* directed to Mr. Justice Peabody, for the purpose of reviewing proceedings had before him on a writ of *habeas corpus*.

The People *v.* McCormack.

The writ of *certiorari* was allowed upon the following affidavit:

NEW YORK SUPREME COURT.

In the matter of The People of the State of New York	}
<i>vs.</i>	
John McCormack.	

State of New York, City and County of New York, ss:

Robert Johnstone, being duly sworn, saith: That a certain writ of *habeas corpus*, and also a certain writ of *certiorari*, were issued on or about the 19th day of February, 1857, by Charles A. Peabody, Esq., one of the Justices of the Supreme Court of the State of New York, returnable before him, directed respectively to the keeper of the city prison, and Michael Connolly, Esq., one of the police justices of said city, requiring them to produce before him, the said justice, the body of John McCormack, detained by him, the said keeper, with the time and cause of his imprisonment, and to certify fully and at large the records and proceedings had and taken in and about such imprisonment and detention; that returns were duly made to said writs, by which it appeared that said John McCormack was detained by the said keeper, under and by virtue of a certain warrant of commitment issued by said Michael Connolly, as such police justice, as being a disorderly person, and also by virtue of a certain commitment issued by said police justice to hold said McCormack for examination upon a charge of bigamy, and that said returns were traversed, and such proceedings were thereupon had that said Charles A. Peabody, justice as aforesaid, did remand said John McCormack; and this deponent further saith, said order and direction of said justice, remanding said John McCormack, was, as deponent believes, erroneous, and said John McCormack should have been discharged, inasmuch as according to deponent's opinion and belief, there was no competent evidence whatever showing that any criminal offence had been committed, of which there was any probable or any cause to believe said

The People v. McCormack.

McCormack guilty, and that said commitments were wholly without jurisdiction and void.

ROBERT JOHNSTONE.

Sworn to before me, this 3d }
day of March, 1857, }

W. H. DUSENBERRY, *Commissioner of Deeds.*

The writ of *certiorari* was as follows.

The People of the State of New York to Charles A. Peabody, Esq., one of Justices of the Supreme Court of the State of New York, *Greeting*:

Whereas, we have been informed that certain proceedings were had before you on behalf of John McCormack, lately convicted of being a disorderly person, that is [L. s.] to say, a person who had abandoned his wife and child in the city of New York, without adequate support, and in danger of becoming a burden on the public, and neglected and refused to provide for them according to his means, whereby an order was made by you on the 21st day of February, 1857, allowing a certain writ of *habeas corpus*, directed to John Gray, keeper of the city prison of the city and county of New York, commanding him to bring before you, the said justice, the body of the said John McCormack, together with the time and cause of his imprisonment, and also allowing a certain writ of *certiorari*, directed to Michael Connolly, Esq., one of the police justices of the said city, commanding him to certify fully and at large to the justices of our Supreme Court, the day and cause of his imprisonment aforesaid, and whereby a certain other order was made by you in said proceedings, upon the return of said writs, on the 21st day of February, in the year aforesaid, remanding the said John McCormack, and we being willing, for certain reasons, to be certified of the said proceedings, writs and orders, and all things appertaining thereto, do command you that you certify the same, with all things appertaining thereto, unto our justices of our Supreme Court, at the City Hall, in the city of New York, on the 16th day of March, 1857, under your seal,

The People v. McCormack.

as fully and amply as the same remain before you, that our said justices may cause to be done further thereupon what of right and according to law ought to be done, and have you then there this writ.

Witness, William Mitchell, Esq., Justice of the Supreme Court,
at the City Hall, in the city of New York, the 3d day of
March, 1857.

RICHARD B. CONNOLLY, *Clerk*.

ROBERT JOHNSTONE, *Attorney*.

Within writ allowed this 3d day of March, 1857.

HENRY E. DAVIES.

To which Mr. Justice Peabody made the following return :

The proceedings hereinafter set forth constitute my return
to the within writ.

C. A. PEABODY.

PETITION FOR HABEAS CORPUS.

To the Hon. Charles A. Peabody :

The petition of Martha Jane McCormack shows that John McCormack is now detained and imprisoned in the city prison of New York city, and that he is not committed or detained by virtue of any process issued by any court of the United States, or by any judge thereof, nor is he committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree: that the cause or pretence of such imprisonment, according to the best of the knowledge and belief of your petitioner, is that he has been arrested on a warrant issued by Michael Connolly, one of the police justices for the city of New York, on a charge of abandoning one Bridget Moore, who claims to be his wife. That on an examination before said Michael Connolly, Esq., on the testimony of said Bridget, uncorroborated, as your petitioner is informed and believes, the said Michael Connolly decided the said John McCormack to be the husband of the

The People v. McCormack.

said Bridget, and remanded him to the city prison until he can give security for her support. Whereas, your petitioner avers that she, your petitioner, is the wife of the said McCormack; wherefore your petitioner prays that a writ of *habeas corpus* issue directed to the keeper of said prison, commanding him to produce the body of the said John McCormack before this honorable court, that he may be relieved of his present illegal imprisonment.

MARTHA JANE McCORMACK.

Dated the 14th day of February, 1857.

City and County of New York, ss:

Martha Jane McCormack, being duly sworn, doth depose and say, that the facts set forth in the above petition, subscribed by her, are true.

MARTHA JANE McCORMACK.

Sworn before me this 14th }
day of February, 1857, }

THOMAS PEARSON, *Commissioner of Deeds*.

WRIT OF HABEAS CORPUS.

The People of the State of New York, to John Gray, Esq.,
Warden of the City Prison, *Greeting:*

We command you that you have the body of John McCormack, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the Hon. Charles A. Peabody, Justice of the Supreme Court, at the Chambers thereof, on the 16th day of February, 1857, at 10 o'clock, A. M., to do and receive what shall then and there be considered concerning him; and have you then there this writ.

Witness, William Mitchell, Esq., Justice, the 14th day of February, 1857.

RICHARD B. CONNOLLY, *Clerk*.

ROBERT JOHNSTONE, *Attorney*.

I allow the within writ.

C. A. PEABODY, *Justice*.

February 14, 1857.

The People *v.* McCormack.

The return to said writ of *habeas corpus* was as follows:

To the said writ of *habeas corpus* return was duly made by the said John Gray, in the words and figures following, to wit:

I, John Gray, Warden of the City Prison of the city of New York, hereby return to the annexed writ, that I hold and retain the said John McCormack, therein named, in my custody, under and by virtue of a certain warrant of commitment, a copy whereof is hereto annexed, and the original whereof I now produce.

JOHN GRAY, *Warden.*

、 COMMITMENT ON CONVICTION AS A DISORDERLY PERSON.

State of New York, City and County of New York, ss:

By Michael Connolly, Esquire, one of the police justices for preserving the peace in the city of New York, to the constables and policemen of the said city, and every of them; and to the keeper of the city prison of the city of New York:

These are in the name of the People of the State of New York, to command you, the said constables and policemen, to convey to the said city prison the body [L. s.] of John McCormack, who was charged before me with being a disorderly person, viz.: a person who had abandoned his wife, Bridget McCormack, in the city and county of New York, aforesaid, without adequate support, and who refused and neglected to provide for her and his two children according to his means: and upon examination of said matter, in the presence of said John McCormack, it appearing to me, by competent testimony, and from the facts and circumstances of the case, that his conduct amounted to such desertion and neglect to provide for his wife and children, I did adjudge and determine that he was such a disorderly person; whereupon, he was ordered to find surety in the sum of five hundred dollars, for his good behavior for the term of one year, and having neglected to find such surety, and I having made up, signed and filed in the county clerk's office a

The People v. McCormack.

record of the conviction of the said John McCormack as a disorderly person, according to the statute, you, the said keeper, are hereby commanded to receive into your custody the body of the said John McCormack, and him safely keep in the said prison, until he shall find such surety as aforesaid, or be thence delivered by due course of law.

Given under my hand and seal, at the first district police police court, in the said city, this 14th day of February, 1857.

(Signed)

MICHAEL CONNOLLY.

TRAVERSE OF THE RETURN

In the matter of the detention
of John McCormack. }

The answer of John McCormack to the return to the annexed writ of *habeas corpus* shows, that this defendant denies that the magistrate had any authority to issue a warrant for the arrest of this defendant, or that there was any competent evidence before him showing that this defendant had been guilty of any criminal offence, to authorize or justify the issuing of said warrant of commitment.

JOHN McCORMACK.

PETITION FOR CERTIORARI.

To the Hon. Charles A. Peabody:

The petition of Martha Jane McCormack shows that John McCormack is now detained and imprisoned in the city prison, in the city of New York, and that he is not committed or detained by virtue of any process issued by any court of the United States, or by any judge thereof; nor is he committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree; that the cause or pretence of such imprisonment, according to the best of the knowledge and belief of your petitioner is,

The People v. McCormack.

that he has been, on the 14th day of February, 1857, arrested, on a warrant issued by Michael Connolly, Esq., police justice for this city, on a charge of abandoning one Bridget Moore, who alleges herself to be his wife; that on an examination before said Michael Connolly, and on the testimony of the said Bridget, uncorroborated, as your petitioner is informed and believes, the said Michael Connolly, Esq., decided the said John McCormack was legally married to said Bridget, and his marriage to deponent was void, notwithstanding your petitioner produced a certificate of marriage between herself and said McCormack, duly authenticated, and remanded said McCormack to prison until he will give security to support said Bridget, wherefore your petitioner prays that a writ of *certiorari* issue, directed to Michael Connolly, Esq., commanding him to certify before this honorable court, the day and cause of his imprisonment, and the affidavits on which he, the said McCormack, is detained.

MARTHA J. McCORMACK.

Dated the 14th day of February, 1857.

City and County of New York, ss:

Martha J. McCormack, being duly sworn, doth depose and say, that the facts set forth in the above petition, subscribed by her, are true.

MARTHA J. McCORMACK.

Sworn before me this 14th day }
of February, 1857. }

THOMAS PEARSON, *Commissioner of Deeds.*

WRIT OF CERTIORARI.

The People of the State of New York to Michael Connolly, Esq., Police Justice, *Greeting:*

We command you that you certify fully and at large to Charles A. Peabody, Esq., Justice of the Supreme Court, at the Chambers thereof, in the City Hall, on [L. s.] the 16th day of February, 1857, at 10 o'clock, A. M., the day and cause of the imprisonment of John McCormack, by you detained, as is said, by whatso-

The People v McCormack.

ever name the said John McCormack shall be called or charged; and have you then this writ.

Witness, William Mitchell, Esq., Justice, the 14th day of February, 1857.

RICHARD B. CONNOLLY, *Clerk*.

ROBERT JOHNSTONE, *Attorney*.

I allow the within writ.

C. A. PEABODY.

February 14, 1857.

To the said writ of *certiorari*, the said Michael Connolly, police justice, did certify and return that he had committed the said John McCormack, in default of finding sureties to be of good behavior to the People of the State of New York for one year, as recited in the foregoing commitment, and that the depositions and testimony taken before him, upon which said warrant of commitment was founded, were as follows—upon which it appeared to him, the said police justice, that the conduct of said John McCormack amounted to such abandonment and refusal to provide for his wife and child in the city of New York, as mentioned in the statute in such case made and provided.

[Here followed the testimony of Bridget McCormack, the complainant, stating that she was married to John McCormack in Ireland, in 1848, that she had lived with him since, both in Ireland and this country, several years, and that since the 9th of December last he had neglected to support her. There was also the testimony of several witnesses, showing that the parties had lived together several years as husband and wife, and the examination of the defendant.]

Mr. Justice Peabody concluded his return as follows:

That upon due consideration of the matter aforesaid, I did decide and adjudge that the warrant of commitment issued by the magistrate was regular and sufficient upon its face, and

The People v. McCormack.

that nothing appeared to show that the magistrate acted without his jurisdiction; and thereupon I did remand the said John McCormack, as provided by law.

C. A. PEABODY.

Dated New York, 1857.

Robert Johnstone, for the defendant, cited *The People v. Cavanagh*, 2 *Park. Cr. R.*, 650; *ex parte Taylor*, 5 *Cowen R.*, 39; 2 *Kent Com.*, 28, 29; *People v. Tompkins*, 1 *Park. R.*, 233, 237; *People v. Martin*, *Ib.*, 188; 1 *Phil. Ev.*, 79; *Gilb. Law of Ev.*, 257; 3 *Russ. on Cr.*, 206; 1 *Phil. Ev.*, 79; *Davies' N. Y. City Laws*, 746, § 7; *King v. Clewiger*, 2 *T. R.*, 263; *Bishop on Divorce*, § 324.

George H. Purser, corporation attorney for the People, cited 2 *R. S.*, 4 *ed.*, 802, § 67; *Bennac v. The People*, 4 *Barb. S. C. R.*, 31, 164; 1 *Hill R.*, 377; 3 *Hill R.*, 658, 661, *note*; *People v. Cassels*, 5 *Hill R.*, 161; *People v. Cavanagh*, 2 *Park. Cr. R.*, 656; *People v. Martin*, 1 *Park. Cr. R.*, 195; *People v. Tompkins*, *Ib.*, 234; *Downing v. Ruger*, 21 *Wend. R.*, 185; *Barnes v. Camack*, 1 *Barb. S. C. R.*, 395; 1 *Phil. Ev.*, 78, 79; 1 *Greenl. Ev.*, § 343; *The People v. Chagary*, 18 *Wend. R.*, 642.

By the Court, MITCHELL, J. The defendant was complained of as a disorderly person, for neglecting to support his wife. The justice received the affidavit of the wife, but there was also other evidence showing that the parties had for many years lived as husband and wife, both here and in Ireland. That was competent evidence of the marriage. The justice convicted the defendant, and issued his commitment in due form of law. The defendant then was brought before a justice of this court on *habeas corpus*. It is not the province of that writ to review errors in the adjudication of an inferior tribunal, nor the sufficiency of evidence before it; it is only to ascertain whether there was jurisdiction to pronounce the sentence of commitment, and whether the commitment is in due form. The judge allowing the writ of *habeas corpus*, accordingly remanded the defendant to custody, and if he could have inquired into

The People *v.* Wilber.

the sufficiency of the evidence, he should have made the same decision.

The statute (2 *R. S.*, 717, § 42), in case of convictions before the Special Sessions, allows a *certiorari* to the Supreme Court, on which, if there was no trial by jury in the court below, the evidence may be looked into. That course was not taken here.

The decision of the judge remanding the defendant to prison, must be affirmed.

Proceedings affirmed.

GENESEE SESSIONS. *Joshua L. Brown*, County Judge. February 1857.

THE PEOPLE *v.* WILBER.

In an indictment under the first section of chap. 109 of the Laws of 1854, entitled "An act for the protection of Gas Light Companies," it is not sufficient to charge the act complained of in the words of the statute.

The relations of the party, whom it is alleged the defendant intended to defraud, to the means by which the fraud is sought to be perpetrated, must be alleged, so that the court can judicially see that the act complained of is calculated, as well as intended, to defraud; and where an indictment alleged, in the words of the statute, that the defendant connected certain pipes, &c., &c., with intent to defraud a gas company, and contained no allegation that the company supplied the gas consumed at the burners; *Held*, that the indictment was defective.

Whether the bare mention of the name of a gas company in an indictment, necessarily implies an allegation of its corporate existence, *quærs.*

The general rules of pleading, and the exceptions thereto, as applicable to an indictment under this statute, and what such an indictment should contain, discussed and stated.

DEMURRER TO AN INDICTMENT.

THE defendant was indicted under the 1st section of the act, chap. 109, of Laws of 1854, entitled "An act for the protection of Gas Light Companies," which enacts "that any person who,

The People v. Wilber.

with intent to injure or defraud any gas company, body corporate or individual, shall make, or cause to be made, any pipe, tube or other instrument or contrivance, or connect the same, or cause it to be connected, with any main service pipe, or other pipe, for conducting or supplying illuminating gas, in such manner as to connect with and be calculated to supply illuminating gas to any burner or orifice by or at which illuminating gas is consumed, around or without passing through the meter provided for the measuring and registering the quantity of gas there consumed, shall be guilty of a misdemeanor."

The first count of the indictment alleges that the defendant, "on the fifteenth day of December, in the year of our Lord one thousand eight hundred and fifty-six, at the town of Batavia, in the county aforesaid, did unlawfully and maliciously connect a pipe in his dwelling house with a certain other pipe, then and there being for conducting and supplying illuminating gas, in such manner as to connect with and be calculated to supply illuminating gas to a large number of burners, to wit: ten burners, then and there being in said dwelling house, at which illuminating gas is consumed, without passing through the meter provided for measuring and registering the quantity of gas in said dwelling house consumed, with intent to injure and defraud the Batavia Gas Light Company, contrary to the form of the statute," &c.

George Bowen (District Attorney) and *Moses Tuggart*, for the people.

H. Wilber, for the defendant.

By the Court, BROWN, County J. An indictment must allege all the facts and circumstances constituting the offence, and necessary to be proved on the trial. It must allege them with certainty, to a certain intent in general; and everything which the pleader should have stated and which is not expressly alleged, or by necessary implication included in what is so alleged, must be presumed against him. And an indict-

The People v. Wilber.

ment for an offence created by statute must, in conformity to these rules, allege all the facts and circumstances necessary to bring the act, charged as an offence, within the statute, and must also, in charging the offence, keep close to and follow the words of the statute itself. (*Archibold's Cr. Pl.*, 38, 48; *Chitty's Cr. Law*, 171, 178, 281, 289.) It is obvious that these rules necessarily exclude all argumentative pleading.

In an indictment for a misdemeanor created by a statute, as a general rule, it is sufficient to allege the act in the words of the statute. But this rule is subject to many exceptions, and by no means dispenses with the necessity of alleging those facts and circumstances which must necessarily exist in order to bring the act within the purview of the statute; for it will hardly be pretended that an act is within a statute, unless it be within its obvious scope and its true intent and meaning.

Statutes are often framed to meet the relations of parties to each other, and to prevent frauds by the one upon the other; and in framing them, the language used is often elliptical, leaving some of the circumstances expressive of the relation of the parties to each other, to be supplied by intendment or construction. In all such cases, the facts and circumstances constituting such relation of the parties to each other, must be alleged in the indictment, though not expressed in the words of the statute.

One reason for this is, that if the facts and circumstances constituting the relations of the parties (or more strictly speaking, the relation of the party intended to be defrauded, to the means by which the fraud is to be perpetrated), do not exist, the act is not within the statute, and hence they must be alleged in order that it may be apparent to the court, as matter of law, that the act is within the true intent and meaning of the statute.

The section of the statute above quoted is evidently intended to prevent frauds upon parties supplying to other parties illuminating gas for consumption, passing, by the ordinary means of conducting it, through a meter provided (pursuant to the contract between the parties), for measuring and registering the

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quantity consumed. The language of this section is plainly elliptical, leaving the words, which are expressive of the relations of the parties, to be supplied by intendment or construction. It is apparent that if the defendant were himself supplying the gas consumed at the burners, the act of connecting the pipes, so as to supply it to them without passing through the meter, would not be within the statute.

To convict the defendant upon this indictment, the prosecution would be bound to prove:

1. The incorporation of the Gas Light Company.
2. That the company was supplying him, by means of a pipe for conducting it, with illuminating gas, which was consumed at the burners mentioned in the indictment.
3. That a meter was there provided for the measuring and registering the quantity of gas consumed *at the burners*.
4. That the defendant connected the pipe which supplied the burners, with the service pipe, in such manner as to be calculated to supply the gas to the burners without passing through the meter.
5. That the act of so connecting the pipes was done with intent to injure or defraud the company.

In order, therefore, to bring the act within the statute, it must appear that some person other than the defendant himself was supplying the gas consumed. There is no express allegation to that effect, nor any from which it can be inferred, unless it be found in the allegation of the intent to injure and defraud the Gas Light Company. It may doubtless be argumentatively inferred from this allegation, that the company were supplying the gas, but an argumentative inference is not sufficient. The intent to injure or defraud, is the ingredient of the offence created by this statute, which gives character to the act, and is necessary to be alleged for that purpose alone. The allegation of its existence, therefore, does not by necessary implication include the allegation of any other fact, or of any circumstance necessary to bring the act within the statute.

The fact that the company supplied the gas would, doubtless, afford evidence that the act of connecting the pipes, so as

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to consume it without its passing through the meter, was intended to injure and defraud them, upon the principle that a party is presumed to intend the consequences which naturally flow from his acts. This, however, would not make the fact *mere* evidence of the intent to defraud.

This being one of the facts and circumstances necessary to be alleged in order to bring the act within the statute, cannot be mere evidence of the intent to defraud. The mere evidence of such intent is to be sought for and found in the presence or absence of a variety of circumstances, which it would be improper to spread upon the record.

Matter not necessary to be alleged in a pleading, may generally and with but few exceptions, applicable to peculiar cases when found there, if inconsistent with, or repugnant to, material and necessary allegations, be rejected as mere surplusage. It will hardly be pretended, however, if an indictment should allege that the gas was supplied by A., and that the defendant committed the act with intent to defraud B., that the former allegation could be rejected as mere surplusage, and a conviction had for doing the act with the intent to defraud B.

If a defendant should be found guilty upon such an indictment, there can be no doubt that the judgment would be arrested.

Where a statute imposes a pecuniary penalty, to be sued for and recovered in the name of the people, or of any public officer, or in a *qui tam* action by an informer, it is material in all cases that the offence or acts charged to have been committed or omitted by the defendant, *appear to have been within the provision of the statute relied upon, and all circumstances necessary to support the action must be alleged.* (1 Chitty's Pl., 372, Springfield edition of 1844, and cases cited in note 4.)

It will hardly be pretended, if this statute gave such a penalty, that a complaint in an action to recover it would be sufficient, if it omitted to allege that the company supplied the gas consumed at the burners. An indictment should at least be as complete in this respect as a complaint in a civil action for the recovery of a penalty.

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If the count contained the allegation that the gas consumed at the burners was supplied by the company, it would then be apparent that the act of connecting the pipes so as to pass the gas around the meter to the burners, was directly calculated to defraud them. It is such an act, thus evidently calculated to defraud another party, that is to be punished under this statute, provided it be accompanied by the fraudulent intent; for the law is not guilty of the folly of dealing with acts, unless it be apparent that they are calculated, as well as intended, to injure or defraud another party or the public.

The court must be able to see judicially that the act was calculated to defraud the company, otherwise the intent to do so cannot appear. This principle is clearly recognized in the following cases: *The People v. Stone*, 9 Wend., 182, 191; *The People v. Williams*, 4 Hill, 9, 12; *The People v. Thomas*, 3 Hill, 169, &c. Indeed, the circumstances which show that the act was calculated to defraud the company, constitute the only foundation whereon the allegation of the intent can be legally predicated.

The decision of this point is put upon the broad ground, that to bring the act of connecting the pipes within the statute, and make it an offence, the relations of the parties must be shown, so that it shall appear, aside from the alleged intent, that it was calculated to injure or defraud the company; and this could only appear by means of an allegation in some form within the established rules of pleading, that they supplied the gas consumed at the burners.

But it does not affirmatively appear in this indictment, that there was any gas consumed there at the time of the commission of the act, or that any person then supplied gas for consumption. The act is alleged to have been committed on the 15th of December last, and the allegation touching the consumption of gas, is in the present tense.

Again, it is by no means clear that the count includes, by necessary implication in what is alleged, any allegation of the incorporation of the gas company, bare as it is of any allegations that they either owned the service pipe or supplied the

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gas; though, if it contained either of these allegations, it would, perhaps, in connection with the other allegations, sufficiently imply the existence of the artificial legal entity. The line of safe precedents, however, would dictate the propriety of stating the fact of incorporation in some appropriate manner; as, for example, by using the words "a certain corporation called The Batavia Gas Light Company," which would doubtless be a sufficient allegation in this respect.

There are other defects in the count under consideration, the most prominent of which is the entire want of any allegation, except an argumentative one, that a meter was provided for measuring and registering the quantity of gas consumed by or *at the ten burners mentioned in it*. It does not appear that these ten burners are all there were in the dwelling house. There may have been twenty other burners there at first, and the meter may have been provided, as alleged in the count, to measure and register the quantity of gas consumed *in the dwelling house*; but notwithstanding all this, it may be that when the pipe which supplied these ten burners was connected with the service pipe, there was another meter provided expressly for the purpose of measuring and registering the quantity of gas consumed *at these ten burners*. It is nowhere plainly alleged that the meter was "*then and there being*," or that it was "provided for the measuring and registering the quantity of gas there," *at the burners aforesaid*, "consumed."

It is against all authority and all safe precedent, to sustain, in criminal cases, pleadings which are open to such serious objections as are apparent in the count under consideration.

Judgment for the defendant.

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DUTCHESS OYER AND TERMINER. September, 1857. Before *Emott*, Justice of the Supreme Court, and the Justices of the Sessions.

THE PEOPLE *v.* THOMAS GILKINSON.

It is no objection to an indictment for selling spirituous liquors without license, to be drank on the premises of the person selling, against the provisions of the act of April 16, 1857, that the act is charged to have been done "without having obtained a license therefor as a tavern keeper, *or* without being in any way authorized to sell the same as aforesaid."

The use of "*or*," instead of "*and*," is fatal in an indictment only where it renders the statement of the offence uncertain.

If one count in an indictment be good, it will sustain a judgment, though the other counts be defective.

Where, in an indictment for selling liquors without license, the acts were charged to have been committed "on the first day of August, 1857, and on divers other days and times between that day and the day of finding the indictment, to wit: the first day of July, 1857," and the count was demurred to on the ground that the offence was thus alleged to have been committed after the finding of the indictment, it was held that all the *continuando* might be rejected, and the demurrer was overruled.

Form of an indictment for selling spirituous liquors without license, against the provisions of the act of April 16, 1857.

The sale of liquors, by an unlicensed person, is an indictable offence under the act of 1857, the punishment of which, as a misdemeanor, is fixed by the statute at three months' imprisonment in the penitentiary, work house, or jail, and a fine of one hundred dollars. No discretion, as to the extent of punishment, is left to the court, as in other misdemeanors.

The defendant was indicted for a misdemeanor in selling spirituous liquors without license, in violation of the act of April 16, 1857.

THE indictment was as follows:

County of Dutchess, ss:

The Jurors of the People of the State of New York, in and for the body of the county of Dutchess, upon their oaths and affirmations, present:

That Thomas Gilkinson, late of the city of Poughkeepsie, in the county of Dutchess aforesaid, on the 12th day of Sep-

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tember, 1857, at the city of Poughkeepsie, county aforesaid, sold by retail to divers citizens of this State, and to divers persons to the jurors aforesaid unknown, and did deliver, in pursuance of such sale, to the said divers citizens and the said divers persons to the jurors aforesaid unknown, strong, intoxicating and spirituous liquors and wines, to wit: one gill of brandy, one gill of rum, one gill of gin, one gill of whiskey, one gill of cordial, one gill of bitters, one gill of wine, one gill of ale, to be drank in the house, store, shop and grocery of the said Gilkinson, at the city of Poughkeepsie aforesaid, without having obtained a license therefor as a tavern keeper, or without being in any way authorized to sell the same as aforesaid, contrary to the statute in such case made and provided, and against the peace of the people of the State of New York, their laws and dignity.

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present: That the said Thomas Gilkinson, late of the city of Poughkeepsie, in said county of Dutchess and State of New York, at the said city of Poughkeepsie, on the 1st day of August, in the year one thousand eight hundred and fifty-seven, and on divers other days and times between that day and the day of the finding of this indictment, to wit: the 1st day of July, 1857, did sell by retail to divers citizens of this State, and to divers persons to the jurors aforesaid unknown, and did then and there deliver, in pursuance of such sale to the said divers citizens, and the said divers persons to the jurors aforesaid unknown, strong and spirituous liquors and wines, to wit: one gill of brandy, one gill of rum, one gill of gin, one gill of whiskey, one gill of cordial, one gill of bitters, one gill of wine, one gill of ale, to be drank in the house, store, shop or grocery of the said Thomas Gilkinson, in the city of Poughkeepsie aforesaid, without having obtained a license therefor as a tavern keeper, and without being in any way authorized, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, their laws and dignity.

C. WHEATON, *Acting District Attorney.*

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The defendant interposed the following demurrer :

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Thomas Gilkinson	}
adsm.	
The People.	

And the said Thomas Gilkinson, by L. B. Sackett, his attorney, comes into court here and defends the wrong and injury, and saith that the said indictment, and the matters therein stated and set forth, are not sufficient in law, and that he, the said Thomas Gilkinson, is not bound by the law of the land to answer the same; and this he is ready to verify.

Therefore, for want of a sufficient indictment in this behalf, the said Thomas Gilkinson prays judgment, and that by the court here he may be dismissed and discharged from the premises in the said indictment specified.

And the said Thomas Gilkinson shows to the court here the following causes of demurrer to the said indictment, that is to say: the statement of the alleged offence in the first count in said indictment is in the disjunctive form, and not made with sufficient certainty.

And also, for that there is not in all or any of the counts of the said indictment any offence shown or stated by or for the people, to have or maintain a criminal action against the said Gilkinson, inasmuch as the sale of the spirituous and other liquors mentioned and set forth in the said counts, is not a crime or misdemeanor, and is not an indictable offence.

And also, for that it appears by the said indictment that the alleged offences therein charged, and each and every of them, were committed since the finding of the said indictment, and that the presentment of the said Gilkinson was made before the commission of the alleged offences, or either of them. And also that the said indictment is in other respects uncertain, informal and insufficient.

L. B. SACKETT, *Attorney for Gilkinson*

L. B. Sackett and John Thompson, for the defendant.

C. Wheaton and J. F. Barnard, for the People.

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The following opinion was delivered by EMOTT, Presiding Justice :

There are two counts in this indictment, to each of which a formal or technical objection is taken. The first count charges the sale of liquor by the defendant, to be drank on his premises, "without having obtained a license therefor as a tavern keeper, *or* without being in any way authorized to sell the same as aforesaid." The objection is, that the word "*or*" vitiates the statement of the offence; that the word "*and*" should have been used, so as to make the sentence read: "without having obtained a license, &c., *and* without being in any way authorized," &c. The rule as to the effect of a disjunctive is, that where it introduces uncertainty in the statement of an offence, it will be fatal. For instance, if in an indictment like the present it were alleged that the defendant sold rum, *or* gin, *or* brandy, that would leave it entirely uncertain what precise offence he had committed, or in what particular he had violated the law. But here the act of selling liquor to be drank on the premises is charged with all necessary certainty, and in the first branch of the sentence which we have quoted, these sales are alleged to have been made by the prisoner "without having obtained a license therefor according to law." The pleader might have stopped here; all that follows is surplusage. There is no other way in which a man can be legally authorized to sell intoxicating liquor to be drank upon his premises, than by a license to him as a tavern keeper. The addition of the words, "*or* without being authorized," &c., cannot have any effect upon the indictment; they do not alter the statement of the offence, nor can they mislead the defendant, and it would be pushing nicety in pleading to an extreme, to suffer the insertion of such a superfluous allegation to defeat the ends of justice.

If the first count of the indictment be good, that will sustain a judgment although the second count should be held defective. (*Kane v. The People*, 8 *Wend.*, 210.) It is not therefore actually necessary for us to consider the objection made to the form of the second count. The answer to this objection,

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however, is also quite obvious. The demurrer is that in the second count the offence is alleged to have been committed after the finding of the indictment, and this is said to be made out by the fact that the offence is laid in this count to have been committed not only on the first of August, 1857, but also with a *continuando*: "on divers other days and times between that day and the day of the finding of the indictment, to wit, the first day of July, 1857." If the day which is here named under the *scilicet*, were the true date of the finding of the indictment, there would be an obvious repugnancy or absurdity in the statement of the offence in the *continuando*. And if this were the only statement of an offence in the second count, the objection might be formidable, although I do not mean to say it would not admit of an answer. But the answer to the demurrer on this point is, that the count is sufficiently certain as to time, which is all that is requisite, in stating an offence to have been committed on the first day of August. As that was in fact before the finding of the bill, as appears from the indorsement of its filing, the count contains one sufficient statement of the offence, and the residue may be rejected. All the *continuando* may be rejected as surplusage, and with it the statement of the time of the finding of the indictment, which is only material in the *continuando*, if at all. This view is sanctioned by the case of *The People v. Adams* (17 Wend., 475), and by the authorities of Hawkins and Chitty, cited by Ch. J. Nelson in that case.

All that remains is the main question, whether the sale of liquor by an unlicensed person is an indictable offence under the act of April 16, 1857. After the most careful examination which I have been able to give to this question since it was argued, I cannot entertain any more doubt upon this than the other points. It may be well to observe, in the first place, that little or no reliance was placed at the argument upon the objection that no indictment could be found until a complaint had been entered with a magistrate, and the party had given bail. I think the counsel for the defendant wisely declined to rest his case upon this defence. It does not strike me with

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sufficient force to need an argument to show that there is nothing in it, and I only mention it to preclude the inference that it had not been considered in giving judgment.

Section 29th of the act in question is as follows: "It shall be the duty of courts to instruct grand jurors to inquire into *all offences* against the provisions of this act, and to present *all offenders* under this act, *and also* all persons who may be charged with adulterating imported, or other intoxicating liquors, with pernicious or deleterious drugs or mixtures, *which offences* are hereby declared to be misdemeanors, to be punished by imprisonment in the penitentiary, work house, or jail, for a period of three months, and by a fine of one hundred dollars." The first, and I think the principal question is, whether the word "offences," in the latter clause of this section, extends to and includes all violations of the statute, or only to that particular class of forbidden acts, the mention of which immediately precedes the phrase. I cannot see any reason to doubt that the words, "which offences," are here used as correlative and with reference to the phrases, "all offences," which it is made the duty of grand juries to inquire into, and "all offenders," who are to be presented, that is, indicted by the grand inquest. Certainly the most natural and obvious reference of the phrase "which offences," is to those acts which are described and included by the words "all offences" against the statute. The adulteration of liquors is not an offence against the act at all, unless it is made so by this very clause, which it is contended declares it, and it alone, a misdemeanor, but which certainly would seem to refer to some thing which had been made or declared offences by some preceding part of the act. The clause in question makes certain offences misdemeanors; but it was not intended, I think, to make any acts offences which were not otherwise and already in that category. Now, the adulterating liquor is no where else referred to in the law in question. It is neither prohibited in terms nor in effect by inflicting a penalty for doing it. On the other hand, there are other acts which are offences against this statute upon well settled principles of law, without reference to this section to

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make them such. It seems to me a forced construction of the clause in question to say that it does not refer to nor include these acts which are offences by force of other parts of the law, whether they are here made misdemeanors or not, but that it is to have the double effect of making the adulteration of liquor an offence against the law, and of making that offence a misdemeanor.

Upon a rigid construction of this section as I view it, this phrase might rather be restricted to the offences and the offenders mentioned in the first clause of the section. But I cannot agree that such a construction should be put upon so plain and so plainly beneficial a statute as this. I think it more in accordance with the meaning of the legislation and with sound principles of construction, to hold that the effect of this portion of this section is to make both the adulteration of liquor and all other acts which are legally offences against the act, to be misdemeanors. At all events, where the statute speaks of "*all offences*," against its provisions as subjects of examination and indictment, and then using the same term with a relative, proceeds to say, "*which offences*" are declared misdemeanors, it seems to me unwarrantable to insist that the offences spoken of in the second and relative sentence, are different from such as are included in the antecedent. The same word is used in both, and in the latter clause it must include all acts which are legally considered offences against the law.

If then all acts which are offences against the statute, and not merely adulterating liquors, are declared to be misdemeanors by the clause in question, and there can be little doubt such was the design of the Legislature, the only question which remains is, whether the sale of liquor by a person not having a license, is an offence against the act. This precise question was raised and decided under the former excise law, as I read the cases and the statutes. Section 28th of that law (1 R. S., 682), was to this effect: "All offences against the provisions of this title shall be deemed misdemeanors, punishable with fine and imprisonment." The statute contained no express prohibition of sales without license, but only sections declaring

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that whoever should sell without a license should be liable to a penalty, almost *totidem verbis* with the 13th and 14th sections of the present act. The question was passed upon by the Supreme Court in two cases, whether this amounted to a prohibition so as to make an unlicensed sale a criminal offence. In *The People v. Stevens* (13 *Wend.*, 341), it was held that an indictment would lie for a violation of these sections. Again, in *The People v. Brown* (16 *Wend.*, 561), the counsel supposing that it might have been overlooked in deciding *The People v. Stevens*, the point was distinctly presented that an indictment will not lie for an act for which a penalty is inflicted, but which is not expressly prohibited in terms. It was the only point in the case, and, after advisement, Judge Cowen pronounced the opinion of the court that they were clear there was nothing in it. In *Griffith v. Wells* (3 *Denio*, 226), it was held that one who sold liquor without a license, could not recover against the purchasers on the same ground, that the act was unlawful because a penalty was inflicted for doing it, although it was not in terms prohibited. Ch. J. Bronson said: "Our excise law does not in terms prohibit the sale of strong or spirituous liquors without a license, nor declare the act illegal, but only inflicts a penalty upon the offender." But he says, "it was laid down long ago that where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful." (*Bartlett v. Viner, Skin.*, 322.) In the report of the same case in *Carthew*, 222, Holt, Ch. J., said "*a penalty implies a prohibition though there are no prohibitory words in the statute.*" Although this was but a dictum, the doctrine has been fully approved." These cases and their reasoning leave no room to doubt that under the present law a sale of liquor to be drank on his premises by a person not licensed, is an unlawful act, and a criminal offence just as if it had been expressly prohibited. The present and former statutes are, as I have said, alike in this respect, and there is as much in the present law as in the former statute to make a sale of liquor by an unlicensed person an offence, and to sustain an indictment against the offender. The only difference in the two acts in this particu-

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lar is, that in the present law a sale which is an offence against the law is not only declared a misdemeanor, but the amount of the punishment is fixed in every case, and nothing is left to the discretion of the court as in other misdemeanors. Whoever is convicted must suffer three months' imprisonment and a hundred dollars fine. I am unable to see how we can refuse to sustain an indictment for selling liquor without a license under the present statute, without overthrowing principles which have been long and thoroughly settled, and overruling cases which were well considered and have been steadily adhered to in the administration of this portion of the criminal law, not to go further back, at least from 1830 down to 1855.

The demurrer is overruled, and there must be judgment for the People.

DUTCHESS OYER AND TERMINER. September, 1857. Before *Emott*,
Justice of the Supreme Court, and the Justices of the Sessions.

THE PEOPLE v. BENJAMIN COLE.

Character is important in a criminal case where it is doubtful, upon the evidence, whether the prisoner committed the act, and where a jury have a right to weigh the probabilities; its bearing is more remote where the act is clearly proved, and where the question is, with what intention and at what suggestions the act was done.

To justify the taking of life in *self-defence*, it is necessary that the prisoner himself should have been attacked; that he should have had reasonable ground to suppose that the object of the attack was to kill him or to do him great bodily harm; that he should have been unable to withdraw himself from such imminent danger, and therefore should have been compelled to kill his assailant to protect himself against his attack.

A person is not responsible for a mistake which he makes in self-defence, in supposing a deadly design which does not exist. But he must be actually assailed, and he must show reasonable ground for supposing that his only recourse was to kill his assailant.

To a certain extent a person must be his own judge in such a case; but if he act honestly and upon reasonable ground, he will not be held accountable for a mistake made under such excitement, and in great apparent personal danger to himself.

Where the prisoner justifies on the ground that the act was committed "necessarily in lawfully keeping and preserving the peace," as where he interferes to prevent A.'s taking the life of B., and to that end kills A., he must show, to establish a defence, not that he had reasonable ground to believe the act necessary, but that it was actually necessary, and that he had no other way to prevent the commission of a felony.

In a case of a mere affray or beating with fists, it cannot be necessary for a third person to resort to firearms, or take life in any case, for the purpose of protecting one combatant from being injured by the other.

If life be unnecessarily taken by a third person interfering between two combatants, for the purpose of preserving the peace, in protecting one against the other, the offence is manslaughter.

THE prisoner was tried on an indictment for the murder of Aaron Cole. The defence was, that the homicide was justifi-

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able. The facts are sufficiently set forth in the charge of the judge to present the questions of law decided.

S. Wodell (District Attorney) and *H. Hogeboom*, for the People.

A. Wager and *J. F. Barnard*, for the prisoner.

EMOTT, Presiding Judge. After some remarks upon the importance of the cause, and the relative duties of the court and jury in such cases, the judge proceeded as follows:

This indictment is for the killing of Aaron Cole by the prisoner, Benjamin Cole, by shooting him with a gun, on the 7th day of June last, and it is charged by the prosecution to have been done willfully, and with premeditation. The taking of the life of Aaron Cole by the prisoner, as also the killing of Chas. Salpaugh; at the same time, by the discharge of the other barrel of the gun, is proved, and indeed admitted, and the only questions for you are, under what circumstances, and with what design, the prisoner destroyed the life of Aaron Cole. The circumstances attending the death of Salpaugh are only important as affecting these questions. So also the quarrels between these parties of fishermen, the interference of one party with the nets of the other, and any invasion or threatened invasion of such property, can have no other bearing. No such quarrels, threats or invasions of property can justify or excuse the taking of life, and you must remove all these facts from your consideration, except so far as they go to show the intention of the prisoner, or characterize the acts of the deceased, and thus to justify or mitigate the homicide, which they do but remotely, if at all.

The character of the prisoner has been proven to have been good. He is spoken of as a quiet and peaceable man. Character is important in a case where it is doubtful upon the evidence whether the prisoner committed the act, and where the jury have a right to weigh probabilities. As this case stands, although we did not feel justified in excluding the evidence,

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its bearing is more remote, and the fact of the prisoner's previous good character can only aid you in deciding with what intention and at what suggestions he fired the fatal shot, if it can aid you at all.

The defence assert that this act is justified by the facts proved in the case, and the first question for you will be whether it is so.

So it is said that the prisoner was justified in killing Aaron Cole in *self-defence*. The right of *self-defence* is a right which is inherent in man; it is the instinct of our nature to assert it when we are in peril, and it would be in vain for human laws to attempt to oppose its exercise. Our law recognizes and defines it. To justify the prisoner in killing Aaron Cole in *self-defence*, it is necessary that the prisoner himself should have been attacked—that he should have reasonable ground to suppose that the object of the attack was to kill him, or to do him great bodily harm; that he should have been unable to withdraw himself from this imminent danger, and therefore should have been compelled to kill Aaron Cole to protect himself from the attack.

You will now recur to the facts, some of which are undisputed, and upon some of which there is a conflict of evidence. It will not probably be necessary for you to go further back in the history of this transaction than to the approach of the boat of Cole and Salpaugh to Kipp. The alleged threats against Kipp are of no importance in this part of the case.

It would seem that when Salpaugh and Aaron Cole came up, having been informed of Kipp's threatening and brandishing his gun, they rowed up to his boat. One, or both—it is disputed which—struck with oars, either at Kipp or at his gun, or first at the gun and then at him. Kipp and other witnesses for the defence swear that he was knocked down with the oar; he says he was stunned. There were undoubtedly outcries and threats of some kind; Salpaugh and Aaron Cole sprang into Kipp's boat, and attacked, and probably beat him with their fists; and some of the witnesses for the defence say they dragged him to the side of the boat as if to plunge him in the river. It is also said

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that the prisoner called to Cole and Salpaugh to desist. Whether they were engaged in this attack upon Kipp, or were leaving the boat when the shots were fired, is disputed; and this point it will be important for you to determine in this and also in another part of the case. It is also disputed, and it is also important for you to ascertain, how far the prisoner was from these parties, that you may determine whether he was in instant danger from these men, and to what extent he was surrounded so as to prevent his escaping if he were in danger. The witnesses are in conflict upon this question, and you must decide which is the correct account of the transaction. You have evidence of the character and appearance of the wounds inflicted upon Salpaugh and Cole, and the extent to which the shot scattered; and this may assist you in ascertaining how far they must have been from the muzzle of the gun when it was discharged.

But the question for you is whether the prisoner was attacked by Aaron Cole, and, unable to escape, was in imminent danger from his attack, so that he was driven to take his life to save his own. Mere threats of what would be done after the design upon another was effected, are not enough. Mere apprehension of danger is not enough. There must be an attack by the person killed upon the prisoner, and imminent instant danger. It is true that a man will not be responsible for a mistake which he makes in self-defence, in supposing a deadly design which does not exist. But he must be actually assailed, and he must show reasonable ground for supposing that his only recourse is to kill his assailant.

1. It is for you to say whether the facts of this case sustain such a belief. If you come to that conclusion you will acquit the prisoner.

2. If you are not convinced that such a necessity, real or reasonably apparent, existed for the prisoner to take the life of Aaron Cole, then you must inquire if the act can otherwise be justified.

It is claimed to be justified as necessary and lawful for the protection of Kipp. This depends upon a different clause of

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the statute, and upon different principles. At the common law, if A. was attacked by B., and was in urgent and immediate peril of his life, and C. interposed to preserve the peace, or even to aid A., and it was *actually necessary* to kill B. to terminate the affray and save the life of A., a third party would be excused for killing him. This principle is preserved in the statute.

Homicide is justifiable when committed "*necessarily in lawfully keeping and preserving the peace.*" You will observe that the language of this section is very different from that of the former. In the section or clause justifying *self-defence*, all that is required is that the jury should see that the man had reasonable ground for believing himself in instant peril. To a certain extent a man must be his own judge in such a case, and if he acts honestly and upon reasonable ground, he will not be held accountable for a mistake made under such excitement and in great apparent personal danger to himself.

But where a man interposes when another is attacked, it must be to keep the peace, and the protection of another must be incidental to this.

And if he killed another under such circumstances, it must be shown that it *was actually necessary for him to do so, not that he had reasonable ground for believing it necessary, but that there was really no other way to prevent the commission of a felony.*

The aspect in which this principle is said to be applicable to the present issue, is that the killing of these two men was necessary to prevent them from taking the life of Kipp. It is said that this is a dangerous defence to be allowed, and there is force in the remark. The principle of the proposed defence, however, is true and right; it has always been a maxim of the common law, and we cannot believe that it has been designedly omitted from our statute book. If one of you were to be passing in our streets, and see an assassin with the knife or the pistol at the breast of another, it cannot be that the law would hold you guilty for even the homicide of the assailant, if necessarily committed to arrest his act. But there is danger in the application of the principle to cases, and juries must be

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on their guard and be sure that a case comes clearly and beyond all doubt within the rule before they apply it.

It cannot be said that to keep the peace in a mere affray, a fist fight, it can be necessary to resort to firearms or to take life in any case. It would not be justifiable for a person assailed with the mere naked fists to use deadly weapons himself, much less can a third person excuse such an act.

You must therefore be satisfied in the present instance, in the first place, that Salpaugh and Aaron Cole designed and were attacking Kipp to kill him, to drown him, or to take his life in some other way, or to maim him. If the actual purpose of these men was, in your opinion, only to beat Kipp with their fists—to have a fight or an affray—it could not have been necessary, and it cannot be justifiable for the prisoner to use firearms.

It is contended that the proof shows an actual intention by these men to take Kipp's life, either (1) with his gun, which they were proceeding to take away from him, or (2) by drowning him. The testimony relied upon to show this, consists of the threats sworn to, and the alleged dragging Kipp to the side of his boat to throw him over. On the other hand, it is said that the only design upon the gun was to make it go off by striking it, and thus render it harmless to these men themselves; and the purpose in getting into Kipp's boat was merely to have a fight.

This is a question for you. If you think that nothing more than a beating with fists was designed and perpetrated, or about to be inflicted on Kipp, then this justification fails. If, however, you are satisfied that the design and attempt was to put him overboard or kill him, then you will have to inquire in the second place whether it was actually necessary in point of fact for the prisoner to kill these men—to kill Aaron Cole, as he did, to prevent the death of Kipp. In this inquiry it will become important for you to determine the relative position and distance apart of these parties at the time of the shot. It is said by the prosecution, that when these shots were fired these men had left Kipp, and were leaving his boat; and that

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this is shown by the place and manner in which the shot entered their bodies. The witnesses disagree as to the distance apart, the position of other boats, and the number surrounding Kipp and the prisoner. If this affair had occurred on land, where actual manual interference could have been resorted to, it is not easy to see how any necessity for the use of firearms could have arisen. The fact that the parties were upon the water in boats is undoubtedly to be considered.

It is for you to say how controlling an element this circumstance shall become. You must be satisfied that it was actually necessary, to prevent the commission of a homicide of Kipp, at the time the shots were fired, for the prisoner to kill Aaron Cole, in order to sustain this defence. If you think so, you will acquit the prisoner. But if this act was not necessary, clearly and strictly necessary, you will be unable to acquit the prisoner. He has then taken human life without necessity, and therefore without justification, and he is morally and legally guilty of a crime, a high crime, and you must say so, and say what the crime is. This will depend upon his design in the act.

1. You may perhaps regard this affair as a fight or affray between these parties of fishermen. If you come to the conclusion that the prisoner interfered merely designing to take the part of Kipp and to fight the party of Peter Cole; that he acted in the heat of passion, and did not design to kill Cole when he discharged his gun, you may find him guilty of manslaughter in the third degree. In considering such a view of the case, it will again be important for you to consider the distance apart and relative positions of the parties. The difficulty in the way of such a view of the case, is the deliberate use of a deadly weapon by the prisoner, and a weapon provided and prepared beforehand, as is claimed by the People. This clause of the statute was intended and is usually applied to deaths caused by stabbing or the like in the heat of a fight.

2. If the design of the prisoner in discharging his gun was to prevent the commission of a crime upon Kipp; if the shooting was in the mere resistance of the attempt, and with that

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purpose only, but in making this interference or resistance, the prisoner *unnecessarily* killed Aaron Cole, you may find him guilty of manslaughter in the second degree.

As I have already observed in reference to an absolute justification of such an act, it would be difficult to apply this section of the statute to the deliberate shooting of a man upon the land without actual necessity, when manual interference might have been resorted to, and where no firearms were used by the assailants of the party attacked. The fact that these parties were on the water in boats at a distance from each other, may make a difference. It is for you to say whether this fact is sufficient to show that in discharging his gun the prisoner intended to interfere and prevent the murder of Kipp, and intended nothing else, and thus discharged his gun as he would have struck a blow had he been at hand.

If you are convinced of this, then, if it was really *unnecessary* for him to use firearms, his responsibility for the act will be for an act of manslaughter, as if he had used undue violence or harsh weapons unnecessarily in a case where he was at hand. But to make the killing manslaughter of this grade, it must have been done simply in resistance of the attempt to kill Kipp, and not with the design to kill Cole.

3. If you cannot bring this homicide within either of these definitions; if it was neither done in self-defence, nor necessarily to prevent the killing of Kipp; nor without a design to take the life of Cole in the heat of passion in an affray; nor with the mere purpose of protecting Kipp, but without any actual necessity, then it was a willful murder. And if it is not justified, and was done with the formed and deliberate purpose to take life, it is murder. It is not necessary that the purpose should have been formed days or hours or minutes before the act. It may have been adopted just before the shooting of the gun. If the prisoner discharged his gun simply intending to kill Cole, and under circumstances which will not justify the act, he is guilty of murder, and it will be your duty to say so. A stern and a painful duty it may be, but one from which you cannot escape, and must not shrink. You are bound to look

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at all the circumstances attending the act in deciding this final issue. On the one hand, it is said that the prisoner did not discharge his gun until appealed to by Kipp, nor until he had called on the others to desist, and that he discharged the gun twice almost without a pause. On the other hand, it is urged, and you cannot help considering it, that he came there with a deadly weapon in an unusual way, and that weapon heavily loaded.

These, gentlemen, are the issues in this case, and to the consideration and trial of these you have now for these three days been secluded from your ordinary occupations and from intercourse with the world outside.

It is an old and a wholesome rule of law that this should be so in capital cases. It is sometimes relaxed: but the court have not felt at liberty to relax its strictness in the case before us. There is an evident interest felt in this cause by the community around us. No doubt there is a similar interest elsewhere, where the cause and the parties are known. There is a public opinion here, how formed, or for whom, should be wholly immaterial to us; but which has endeavored to make itself manifest even within these walls. The object of separating you from all ordinary intercourse, is not only that you may give your whole minds and deliberate and intelligent thought to so momentous a trial, but that you should be kept from knowing or feeling what the sentiment of the public, or any part of it, is. Your duty here is the most solemn, the most important you can be called upon to discharge. You have been kept here at much inconvenience, I know, and it may be at more or less actual loss to some of you to perform it. Your only recompense for your labor and your loss will be the consciousness hereafter that you have discharged it aright; not to the satisfaction of any man or men of the community about you, or of any part of it, but so as to answer the dictates of your consciences and the obligations of your oaths. God forbid that either you or I should ever take a part in depriving an innocent man of his liberty or his life. None of us need to be admonished to be careful for this. The feeling of

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mercy, the disposition to forget the past, the guilty act and its consequences, and to think only of the present and the future, with the unhappy man before us, is so strong that we are all of us liable, consciously or unconsciously, to be swerved to the side of mercy when we administer justice.

The law directs you to give the prisoner the benefit of every reasonable doubt of his guilt. And I cannot but feel for myself that I have in this case given this man the benefit of the most merciful construction of the statutes I have read. But we must not forget that mercy is not your prerogative nor mine. We can only recommend its exercise. We must shut our eyes to everything but the law and the testimony. This duty must fall somewhere, stern and painful though it may be. It has fallen now upon me and upon you. I am bound to expound to you the law as it is; you must apply it to the facts as they are. We have to deal with justice, and not mercy; to act on the truth, and not by our sympathies. It is unnecessary to remind you of the awful interests which this case involves to the prisoner, or to exhort you not to do more than your oaths and your consciences demand to punish this man. But the life or death of the prisoner is not all that is involved here. The protection and security of life, the most vital interests of society, require of you that you should not, for fear, or favor, or affection, or sympathy, do less than the law and the testimony put before you. If juries will depart from the paths of their duty to render verdicts which are dictated by other considerations, such verdicts will surely return, if not in their day, in that of their children, to punish their authors; it may be in their dearest concerns.

I commit this cause to your deliberate, intelligent and conscientious judgment, and may God Almighty guide you to the truth.

The jury found a verdict of "not guilty."

SUPREME COURT. Clinton General Term, May, 1858. *C. L. Allen, James, Rosekrans and Potter*, Justices.

THE PEOPLE *v.* BENJAMIN SHAVER.

Where a prisoner is let to bail by an officer out of court, the recognizance taken must be filed, as required by statute, before any action can be taken upon it by the court; and no suit can be maintained upon such a recognizance, without averring in the complaint and proving on the trial that it had been filed, or made a record of the court in which it was returnable.

It is a good defence to an action on a recognizance, that it was taken on an illegal arrest of the prisoner, for whom the defendant became bail.

A complaint in writing charging S. with bigamy, alleged to have been committed in Albany county, was made before a justice of the peace of Fulton county, who issued his warrant for the arrest of S., under which S. was arrested in Montgomery county, by a constable of the latter county (the warrant not having been first indorsed by a justice of Montgomery county), and brought into the county of Fulton before the justice who had issued the warrant, upon whose requirement a recognizance was entered into to appear at the next Court of Sessions to be held in Montgomery county: *Held*, that the arrest was illegal, and the recognizance void for duress; that it should have been directed to an officer of the county in which the justice who issued it was a magistrate; and that the justice who issued the warrant had no authority, in a case like that before him, to take a recognizance for the appearance of the prisoner at a Court of Sessions of any other county than that in which the justice resided.

Form of a complaint on recognizance, and of an answer thereto, setting up the above mentioned defence.

THIS was an action on a recognizance. The complaint was as follows:

SUPREME COURT, MONTGOMERY COUNTY.

The People of the State of New York <i>agst.</i> Benjamin Shaver.	}
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The plaintiff alleges that the defendant, on the 30th day of July, 1856, at Ephratah, in the county of Fulton, in the State

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of New York, made, executed and delivered, the bond of which the following is a copy, together with one Nathan Shaver

Fulton County, ss:

Be it remembered that on the thirtieth day of July, 1856, one Nathan Shaver, in Albany county, and Benjamin Shaver, in Fulton county, of the same place, personally came before me, Aaron Nellis, a justice of the peace of said county, and severally and respectively acknowledged themselves to be indebted to the People of the State of New York, that is to say, the said Nathan Shaver, in the sum of two hundred dollars, and the said Benjamin Shaver, in the sum of five hundred dollars, each to be levied of their respective goods and chattels, lands and tenements, to the use of said People, if the said Nathan Shaver shall make default in the condition following:

Whereas, The said Nathan Shaver has been duly brought before me, the said justice, charged with the offence of bigamy, and having been duly examined before me touching said offence, and having been by me let to bail thereon:

Now the condition of this recognizance is such that if the said Nathan Shaver shall personally appear at the next Court of Sessions, to be held in and for the county of Montgomery, on the first Tuesday of September next, then and there to answer to an indictment to be preferred against him for bigamy, and to do and receive what shall by the court be then and there enjoined upon him, and shall not depart the court without leave, then this recognizance to be void, or else to remain in full force.

NATHAN SHAVER [L. s.]

BENJAMIN ^{his} ~~X~~ SHAVER. [L. s.]
mark.

Taken, subscribed and acknowledged the day and year first above written before me.

AARON NELLIS.

The plaintiffs also allege, that upon complaint duly made and preferred before said Aaron Nellis, then and there an acting justice of the peace of the town of Ephratah, Fulton

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county, against said Nathan Shaver, upon a charge of bigamy, viz.: for marrying a second wife in the city and county of Albany, in the month of October, 1855, while a former wife of said Nathan, then and there was still living and remaining his lawful wife as aforesaid, a warrant was, on or about the 30th day of July, 1856, aforesaid, issued against said Nathan, and that said Nathan had been at the town of Ephratah, in the county aforesaid, on the day aforesaid, but had then recently departed therefrom, and gone to the town of Palatine, in the county of Montgomery, where he was duly arrested thereon, and by virtue thereof taken by a constable of the county of Montgomery, to and before said justice, by and before whom the above recognizance was entered into by said Nathan and his surety aforesaid, defendant in this cause.

And the plaintiffs further allege, that all and every of the facts recited in said bond or recognizance are true, and that said justice had full power and authority to accept and take the same pursuant to the Revised Statutes in such case made and provided.

That said Nathan Shaver referred to in said bond or recognizance, and the defendant in this cause, did not comply with the terms and conditions thereof, but said Shaver wholly neglected to appear at the then next and last Court of General Sessions, held in and for the county of Montgomery, at the court house in Fonda, on the first Tuesday, which was the second day of September, 1856, and continued until the third day of September thereafter, according to the terms and conditions thereof, and in the manner required thereby. Although said Shaver was duly called for that purpose, on or about the 3d day of September last, and during the session of said court, and the said court then and there ordered said recognizance to be forfeited and prosecuted, but gave said Benjamin Shaver a stay of proceedings on said bond or recognizance until the then next ensuing term of Oyer and Terminer, to be held, and which was held, in and for the said county of Montgomery, on the 18th day of November last past, and which order was duly entered upon the records of said court, but the said Benjamin

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wholly neglected to surrender the said Nathan, at and within the time specified in said order, though said court was duly held and passed, still does neglect to do so.

Therefore, the plaintiffs demand judgment against said defendant for five hundred dollars, with interest thereon, from said 3d day of September, 1855, beside costs.

P. G. WEBSTER, *District Attorney.*

The answer was as follows :

SUPREME COURT.

The People of the State of New York,	}
plaintiffs,	
<i>agst.</i>	
Benjamin Shaver, defendant.	

Benjamin Shaver, the above named defendant, answers the complaint of the above named plaintiffs, and denies each and every allegation set forth and contained in the plaintiffs' complaint.

2d defence. And for further answer to said complaint, the said defendant says, that sometime in the month of July, 1856, one Aaron Nellis, a justice of the peace of the county of Fulton, issued his warrant against one Nathan Shaver, who was then in the county of Montgomery, without any complaint made before him or other evidence, charging the said Nathan Shaver with having committed the crime of bigamy, or any other crime or offence whatever; but issued the same wrongfully and without authority of law. That the said Nathan Shaver was arrested under pretence of authority, in the county of Montgomery, by virtue of said pretended warrant, and wrongfully and without authority, taken before said justice in the town of Ephratah, in said county of Fulton, for examination before said justice, in the town of Ephratah. That said Nathan Shaver objected to the authority and jurisdiction of said justice, but that said justice refused to discharge said Nathan Shaver, but wrongfully, and without authority of law, required the said Nathan Shaver to give bail for his

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appearance at the Court of Sessions to be held in the county of Montgomery, on the first Tuesday of September then next, and to execute a bond, with a sufficient surety, for his said appearance as aforesaid. And the defendant further says, that at the request of the said Nathan Shaver, and for the purpose of having him released and discharged from unlawful imprisonment, he, this deponent, signed said bond, a copy of which is set forth in the plaintiffs' complaint herein. And the said defendant alleges that all proceedings had before said justice were without authority or jurisdiction, and that said bond, given as aforesaid, is wholly void, and of no effect whatever.

MARTIN McMARTIN, *Attorney for Defendant.*

The action came on to be tried at a Circuit Court, held in and for Montgomery county, on the 13th day of May, 1857, before the Hon. E. H. Rosekrans, Justice of the Supreme Court, without a jury.

The plaintiff proved the execution of the recognizance described in the complaint, by Aaron Nellis, the justice who took the same, and also proved that said Nellis, at the time and place therein mentioned, was a justice of the peace in and for the county of Fulton. That on complaint of Levi Gray, which was in writing, showing that Nathan Shaver had married a second wife in the county of Albany, his first wife being still living, and not divorced from him, he issued a warrant in the usual form for the arrest of said Nathan Shaver. That said Nathan Shaver was arrested thereon in Montgomery county, by a constable of the county of Montgomery, and brought before said Nellis, justice of the peace of the county of Fulton, who took the recognizance. The warrant had not been indorsed in Montgomery county.

That the said Nathan Shaver did not appear at the General Sessions in Montgomery county, and that his default was taken thereat.

The defendant hereupon moved to nonsuit the plaintiff on the following grounds:

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That the complaint did not aver that the recognizance was ever filed or was entered of record in the Court of Sessions of Montgomery county.

That the justice had no jurisdiction to issue his warrant on the proof before him, as the complaint did not show that a crime had been committed.

That the justice had no jurisdiction in the premises, the crime not having been committed in the county of Fulton, nor the offender being present in said county, and that the proceedings had before said justice were void.

The motion for a nonsuit was granted, and the plaintiffs' counsel excepted, and appealed to this court.

Martin McMartin, for the defendant.

I. A justice of the peace has no power to issue process of arrest unless the crime was committed in his county, or the offender is present in said county. (*The People v. Cassells*, 5 *Hill's Rep.*, 165.)

II. The warrant, if directed to a constable of Montgomery county, by a justice of the peace of Fulton county, was void, as the justice has no authority over the acts of constables out of his own county. And if the warrant was not directed to him, then he had no authority to make the arrest, as "none except those (or one of them), to whom a warrant is directed, have power to act under it." (1 *Chitty's Cr. Law*, 48.)

III. Again, the warrant was not indorsed by a justice of the peace of Montgomery county, and the arrest was therefore void. (2 *R. S.*, 3d ed., 793, § 5; *Barbour's Cr. Law*, 528.)

IV. The original arrest of Nathan Shaver, therefore, being void, the justice acquired no jurisdiction in the matter. "An arrest without warrant, when a warrant ought previously to have been issued, will not be rendered legal by a subsequent issuing of that authority." (*Barbour's Cr. Law*, 551; 1 *Chitty's Cr. Law*, 19; *Bac. Ab.*, *Trespass*, "D.")

The bill of exceptions is silent as to the place where Shaver was arrested, although the bill as prepared, and amendments as

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proposed, show it to have been at St. Johnsville, Montgomery county, and as the bill shows that he was arrested by a constable of Montgomery county, I suppose that it will be intended that the arrest was made there. But should it be intended that the arrest was made in Fulton county, then the justice clearly had no power to recognize him to appear at a court holden in Montgomery county. (3d ed. *Revised Statutes*, vol. 2, 796, § 28; also 795, § 22; also 773, § 10.)

The proceedings before the justice being without authority, the recognizance is utterly void, both at common law and by statute. (2 *Revised Statutes*, 214, § 60, 2d ed.; *The People v. Brown*, 23 *Wend.*, 47.)

V. It was neither alleged in the complaint, nor proved upon the trial, that the recognizance had ever been filed or became matter of record in the court. (See *The People v. VanEps*, 4 *Wend.*, 387.)

Henry Sacia, for the People.

I. The recognizance having been duly filed, became a record of the court, *ipso facto*, and no further averment was necessary in this respect to sustain the action. (8 *Cow.*, 340; 10 *Wend.*, 464; 5 *Sanf.*, 54.)

II. The accused having been apprehended in Montgomery county, the offence was triable there according to statute, and the recognizance properly belonged in that county. (2 *R. S.*, 1st ed., 688; 2 *Leach C. C.*, 826.)

III. It is submitted that, for the purposes of arrest and examination in criminal cases, a justice of the peace is an officer of the State. (4 *Bl. Com.*, 290; 1 *Chit. Cr. Law*, 75; *Barb. Cr. Law*, 485.) 1. He is clearly confined to the territorial limits of his county, as far as his *personal action* is concerned, but *he may inquire therein*, whether an offence has been committed against the state. (9 *Wend.*, 322; 2 *Hale*, 50, 51.) 2. His warrant is properly issued in behalf of the people of the State, and it can be so issued even where the offence is against the United States. (5 *Cow.*, 273; 19 *J. R.*, 279.)

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IV. He is expressly *authorized by statute* to issue a warrant "whenever it shall appear that any *criminal offence has been committed*," without regard to the place of its commission. (2 R. S., 706, § 3.) 1. The first section of this chapter speaks of justices merely as *town officers*, "elected in any town," yet confers the power mentioned, which in this respect is co-ordinate with that of the "chancellor," &c., in like cases. (*Id.*, § 1.) 2. The very next title in relation to summary *trials* before these magistrates, cautiously gives *that jurisdiction* only, in cases "arising within the irrelative counties." (*Id.*, 711, § 1; 2 Cow., 815; 16 Wend., 297.)

V. It is believed that the magistrate in this case pursued the statute, and acted in accordance with the common law, which justified the arrest and legalizes the recognizance. 1. The *dictum* of Judge Bronson in *The People v. Cassells*, is not based on argument or authority; the case was disposed of on the ground that the district attorney had no notice of the proceeding, and it is respectfully urged that there is no precedent for it, and that it is contrary to the policy of our laws.

By the Court, ROSEKRANS, J. The statute requires that whenever a prisoner shall be let to bail by an officer out of court, the officer shall immediately cause the recognizance taken by him to be filed with the clerk of the county in which the party bailed was imprisoned. (2 R. S., 4th ed., 893, § 34.) The recognizance is to be certified by the magistrate taking the same, to the court at which the defendant is bound to appear. (*Id.*, § 28.) The court can take no action upon the recognizance until it is filed; and for that reason, power is conferred upon the court to compel the return of the recognizance in case the magistrate who took it omits to certify and file it as the statute requires. And, in an action upon a recognizance, it is necessary that it should appear that the recognizance was filed in or made a record of the court in which it is returnable. (*People v. Huggins*, 10 Wend., 472, 464; *People v. Van Eps*, 4 Wend., 393, and cases there cited.) In the case of *People v. Huggins*, *supra*, although the declaration did not positively aver the fact that

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the recognizance was filed in or made a record of the court, yet, as it referred to the recognizance as a record of the court, it was held, upon general demurrer, that the pleading was good. In this case the complaint does not contain any averment of or allusion to the fact, that the recognizance upon which the action is founded, was ever filed or made a record of the court, and, within the authorities, the nonsuit was proper upon that ground. The complaint did not state facts sufficient to constitute a cause of action. Without the filing of the recognizance, the order that it be forfeited and prosecuted was a nullity. The court had no power to make such order. Had the plaintiff furnished proof, upon the trial, of the filing of the recognizance, the complaint might have been amended; but no such proof was offered.

The recognizance, too, appeared to have been taken under illegal duress of the prisoner, for whom the defendant became bail. The complaint averred, and the proof showed, that upon an unindorsed warrant issued by a justice of the peace of Fulton county, a constable of Montgomery county arrested the defendant named in the warrant, in the latter county, and took him before the justice who issued the warrant in Fulton county. While under this arrest, the recognizance was entered into. Assuming that the warrant was legally issued, it could only have been directed to an officer of the county in which the justice of the peace who issued it was a magistrate, and such officer could only have executed the warrant in that county, unless the defendant had escaped to or was in another county, "*out of the jurisdiction of the magistrate who issued the warrant,*" and then only upon proof of the handwriting of the magistrate who issued it being furnished to an officer in the latter county, and obtaining his indorsement of the warrant; and such indorsement would authorize the officer bringing the warrant, or any other officer to whom it may have been directed, to execute the warrant in the county where it was indorsed. (2 R. S., 4th ed., 890, § 3, 45.) Such indorsement would extend the jurisdiction of the officers of the county in which the magistrate who issued the warrant resided, to the county in

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which the warrant was indorsed, but it would not confer any power upon an officer of the latter county to arrest the defendant any where, not even in his own county, nor to take the defendant out of his county before any magistrate in the county in which the warrant was issued. The privilege of avoiding a contract on the ground of duress, is generally personal to the party under duress, and the general rule is, that no other person can take advantage of it. An exception, however, is made in favor of a surety. (*Fisher v. Shattuck*, 17 *Pick. R.*, 152.) In *Theobald on Principal and Surety* (1 *Law Lib.*, 2), it is said that "the obligation of the surety being *accessory* to that of the principal, it is of its essence that there should be a valid obligation of a *principal debtor*. The nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal there "cannot be an accessory." And at page 207 (*Marg.*), it is said, "the office of bail, it is evident, is founded on the privilege given by the law to the plaintiff, of arresting and imprisoning, and keeping in prison the defendant; and, therefore, if the plaintiff in any case, either had not the right to arrest, or by his own act or the act of the law, has lost the right to keep the defendant, the derivative right of the bail ceases; and their right of keeping the defendant being gone, they are discharged from the obligation of keeping him. In *McClintock v. Cummins* (3 *McLean R.*, 158), it was held that a father and son may each avoid his obligation by duress of the other, and also a husband by duress of his wife.

Besides, the recognizance was void, under the circumstances, as to both principal and surety, on the ground that it was taken before a magistrate of the county of Fulton, by whom the warrant of arrest was issued for the appearance of the principal at the Court of Sessions in the county of Montgomery. The justice of the peace derived all his authority to take the recognizance, from the statute; and unless the provisions of the statute are complied with, the recognizance is a nullity. A party may be indicted for a second, third or other marriage, prohibited by statute, in the county in which he may be appre-

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hended, and the same proceedings had upon such indictment as if the offence had been committed there. (2 *R. S.*, 4th ed., 870, § 10.) But this provision refers to a lawful arrest. Conceding that the arrest in Fulton county was legal, the recognizance should have been made returnable at the next criminal court in that county having cognizance of the offence. (2 *R. S.*, 892, § 21.) The statute makes no provision for the taking of a recognizance by a magistrate upon a warrant issued before indictment for the appearance of a party at a court in any other county than that in which the magistrate taking it is an officer, except where a warrant has been issued for an offence not punishable with death or imprisonment in a state prison, committed in the county of the magistrate who issued the warrant, and the defendant has escaped to, or is arrested in, another county, and is brought before a magistrate of the latter county, upon a warrant indorsed by a magistrate of such latter county. In such case, the magistrate before whom the defendant is brought, may take a recognizance for the appearance of the defendant at a court to be held in the county of the magistrate who issued the warrant. (2 *R. S.*, 890, §§ 8, 9, 10, 11.)

If the warrant under which the recognizance in this case was taken, had been properly issued by a justice of the peace in Fulton county, and had been indorsed by a justice of the peace in Montgomery county, and the defendant arrested in Montgomery county by a constable of the county of Fulton, the offence charged in the warrant being punishable with imprisonment in a state prison, the defendant must necessarily have been taken to Fulton county before some magistrate of that county. The arrest of the defendant in Montgomery county, under the Fulton county process, by a Fulton county officer, would be deemed in law an arrest in Fulton county for all the purposes of examination of the defendant, the taking of bail, and trial for the offence charged. The justice in Fulton county could not, however, take a recognizance under that proceeding for the appearance of the defendant in a court in any other county than Fulton. The statute relating to indictments

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for bigamy in the county where the defendant may be apprehended, was not intended to authorize the taking of such a recognizance as that counted upon in this case.

The nonsuit was rightly ordered, and the judgment entered upon it should be affirmed.

SUPREME COURT. Cayuga General Term, June, 1858. *Welles, E.*
Darwin Smith and Johnson, Justices.

THE PEOPLE v. JOHN C. CHAPMAN.

An indorsement of a negotiable promissory note is a signature to a written instrument within the meaning of the 2 R. S., 677, § 53, and obtaining such an indorsement by false tokens or pretences, is punishable under that statute.

Where, in an indictment for obtaining an indorsement of a note by false pretences, the note was set forth at length, and it thus appeared to have been made by the defendant, and payable to the order of the prosecutor, and there was no averment that the indorsement was made for the accommodation of the defendant, it was held that the indictment was defective for want of such averment, the presumption being, on the face of the note alone, that it was the property of the prosecutor at the time of his indorsement.

This case distinguished from that of *Fenton v. The People* (4 Hill, 126).

THE defendant was indicted in the Court of Sessions of Seneca county, for obtaining the indorsement, by false pretences, of Deming Boardman to a note.

The indictment, after the caption and the names of the grand jurors, proceeded as follows: "good and lawful men of said county, being duly sworn and charged, upon their oaths present, that John C. Chapman, late of the town of Seneca Falls, in said county, merchant, on the ninth day of November, in the year of our Lord one thousand eight hundred and fifty-five, at the town of Seneca Falls, in said county of Seneca, feloniously, unlawfully and designedly, did falsely pretend to one Deming Boardman, with intent thereby, then and there, to cheat and defraud the said Deming Boardman; that he, the

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said Chapman, was, and had been previous thereto, in the business of buying and selling grain; that one boat load of barley, which he had bought and then owned, arrived in the city of Albany one or two days previous to that day; and that he then had two boat loads of grain on the canal on the way to Albany, and that he had at least one boat load more of grain in the storehouse of Wilcox and Squires, up Seneca lake; that he had barley and oats enough on hand and paid for to pay every dollar that he, said Chapman, owed; by means of which false pretences the said John C. Chapman did feloniously and unlawfully obtain from the said Deming Boardman, his, the said Boardman's, signature, as indorser, by indorsement upon and to a certain promissory note in writing, which said promissory note and indorsement are in the words and figures following, to wit:

\$1000.

SENECA FALLS, Nov. 9, 1855.

One month after date I promise to pay to the order of D. Boardman one thousand dollars, at the office of Smyth & Gifford, in Albany, N. Y. Value received.

No.

(Signed)

JOHN CHAPMAN.

Indorsed on the back thereof, 'D. Boardman,' with intent thereby, then and there, to cheat and defraud the said Deming Boardman." The indictment then proceeded to negative the said pretences, and concluded as follows: "to the great damage and deception of the said Deming Boardman—to the evil example of others—against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity."

The defendant pleaded not guilty and demanded a trial.

The trial came on at a term of the same court on the 18th day of November, 1857.

Before the district attorney had given any evidence upon the merits, the defendant's counsel moved that the indictment be quashed, for the reason that no offence is alleged in it, and

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contended: 1st. That the obtaining of an indorsement is not within the statute. 2d. That it appears from the indictment that the note was made payable to Boardman's order, and it is not averred that it was an accommodation indorsement, or that the note was ever delivered to Chapman by Boardman. The motion was overruled by the court, which refused to quash the indictment.

The same motion was again made and denied at the close of the evidence on the part of the prosecution.

The defendant was convicted, and the case was brought to this court by *certiorari*.

A. T. Knox, for the defendant.

J. K. Richardson (District Attorney of Seneca county), for the People.

By the Court, WELLES, J. The point raised by the defendant's counsel, that the obtaining an indorsement of a promissory note by false pretences, is not within the statute, cannot be maintained. The act made criminal by the statute, is by false tokens or pretences to "obtain the signature of any person to any written instrument." An indorsement to a negotiable promissory note is a signature to a written instrument, within the meaning of the statute. This precise question has not, that I am aware of, been ever formally passed upon by this court. It is one, however, which might have been raised in a large share of the cases which have been prosecuted under the section of the statute in relation to obtaining signatures by false pretences. (2 *R. S.*, 677, § 53.)

The other ground taken by the defendant's counsel, in relation to the sufficiency of the indictment, is a much more serious one. The note set forth in the indictment is *prima facie* an instrument in writing evidencing an indebtedness to the amount expressed, by the defendant Chapman to Boardman, the prosecutor. It is payable to his order, and the presumption is, until the contrary appears, that it was the property

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of Boardman. Unless, therefore, it sufficiently appears by proper averments, that the note was made by the defendant for his own benefit, and that he obtained the indorsement of Boardman with intent afterwards to negotiate it on his own account, and that Boardman, after indorsing the note, delivered it to the defendant, and that the defendant received it for that purpose—in other words, that it was an accommodation indorsement—the case made by the indictment is, that Boardman having taken the note in question, payable to his own order, for a debt due to himself from the defendant, was induced by the representations set forth, to indorse and deliver it back to Chapman.

It is contended, however, in behalf of the people, that the indictment does show that the indorsement was made for the accommodation of the defendant; that the allegation, that by means of the representations stated, the defendant did *obtain* from Boardman his indorsement of the note, implies a delivery of it by Boardman to the defendant with the indorsement of the former upon it. The case of *Fenton v. The People* (4 Hill, 126), is regarded by the counsel for the people as conclusive in support of this proposition. In that case, Fenton was indicted for obtaining the signature of one Rich to a bond and mortgage by false pretences. The bond and mortgage were charged to have been payable to one Wyckoff, and the indictment did not expressly aver their delivery to Fenton, the defendant; but it charged that the defendant did *obtain* the signatures of Rich to them. The court held the indictment sufficient. Nelson, Ch. J., in delivering the opinion of the court, said: "There can be no doubt that, to constitute the offence aimed at by this indictment, there must be not only a signing but a delivery of the instrument. The one without the other would harm nobody; but I am of opinion that the averment here made comprehends both. It is difficult to see how the signatures to the bond and mortgage could have been obtained by the prisoner, unless they were delivered to him. If kept by Rich after the signing, clearly they were not *obtained*. The word imports a delivery."

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This authority proves, only, that where the averments in the indictment show a case in all other respects within the spirit and object of the statute, the allegation that the defendant obtained the signature, &c., is a sufficient averment of its delivery to him. But does it overthrow the presumption of law arising from the form of the note, that it was evidence of an indebtedness from the maker to the payee? It seems to me that it does not. There is no reason why the prosecution should be excused from a direct averment of the facts necessary to constitute the case one of an accommodation indorsement, or that the court should give to the word *obtain* an efficiency beyond what it necessarily possesses. The utmost that can be claimed for it in the present case is, that the note in question, with the legal presumption attached to it, was delivered by Boardman to the defendant. The legal inference from the transaction, as thus modified, is, that Boardman, holding the note of the defendant, payable to his, Boardman's, order, for a debt due to him from the maker, indorsed and delivered it, without payment, to the maker. Stopping here—and the indictment carries the case no further—the transaction, in my judgment, was not one contemplated by the statute. When the defendant was thus possessed of the note, it was of no efficacy in his hands, and it is impossible to see how Boardman, or any one else could, in a legal sense, be injured by it. If it should be said that although the note was of no validity in the hands of the defendant, or in the hands of any one else with notice, against Boardman, yet if the defendant had, under pretence that it was an accommodation indorsement, negotiated the note to a *bona fide* purchaser for value, the answer is, that the crime would consist, in that case, in the representation made by the defendant upon negotiating the note. Until then no harm, in a legal sense, would have been done. The note, as between the defendant and Boardman, would have been in fact canceled, and in every respect inoperative, and the mischief, if any had followed, would have been in the defendant's fraudulently giving it vitality by passing it off before its apparent maturity to a *bona fide* purchaser with-

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out notice. But that would be a very different case from the one made by this indictment. If it was a case of an accommodation indorsement, as the counsel for the people contends, and as the evidence shows, it was easy to set it forth in that aspect by proper averments.* The theory of the case on the part of the people, should be distinctly and unequivocally put forth in the indictment, and not be left to uncertain inferences.

If the foregoing view is correct, it is unnecessary to consider the other questions raised by the bill of exceptions and discussed upon the argument.

In my opinion, the conviction should be reversed and the proceedings remitted.

Ordered accordingly.

SUPREME COURT. Albany General Term, September, 1858. *Wright, Gould and Hogeboom, Justices.*

THE PEOPLE v. ABRAHAM DAVIS.

An indictment charging an assault and battery with "an intent to kill," without also charging that the assault and battery were committed with a deadly weapon, or by such other means or force as were likely to produce death, will not warrant a conviction for any offence higher than assault and battery.

A verdict by which the prisoner is found "guilty of an assault and battery with intent to kill," without reference to a sufficient indictment, and without specifying the means by which the assault and battery were committed, will authorize no sentence for any offence beyond a simple assault and battery.

CERTIORARI to the Court of Sessions of Ulster county. By the return it appeared that an indictment was found in that court against the prisoner and one James Dumond, as follows: *State of New York, Ulster County, ss:*

The Jurors of the People of the State of New York, in and for the body of the county of Ulster, upon their oath, present:

That Abraham Davis and James Dumond, late of the town of Kingston, in the county of Ulster, aforesaid, on the nine-

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teenth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, at the town and county aforesaid, in and upon Eugene Best, of the town of Kingston, then and there being, did feloniously make an assault, and they, the said Abraham Davis and the said James Dumond, with certain clubs, one of which the said Abraham Davis and the said James Dumond, each in his right hand then and there had and held, the same being deadly and dangerous weapons, did beat, strike, cut and wound, with intent, him, the said Eugene Best, then and there feloniously and willfully to kill, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Abraham Davis and James Dumond, on the said nineteenth day of November, in the said year 1857, at the place aforesaid, with force and arms, in and upon the said Eugene Best, then and there being, feloniously did make an assault; and they, the said Abraham Davis and James Dumond, with certain clubs, which they, the said Abraham Davis and James Dumond, then and there had and held in their hands, the same being deadly and dangerous weapons, feloniously did beat, strike, cut and wound, with intent, him, the said Eugene Best, then and there feloniously to kill and murder, and other wrongs then and there did, to the great damage of the said Eugene Best, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Abraham Davis and the said James Dumond, late of the said town of Kingston, on the said nineteenth day of November, in the said year 1857, with force and arms, at the place aforesaid, in and upon the head and face of the said Eugene Best, feloniously did make an assault; and they, the said Abraham Davis and James Dumond, with their fists and feet, did then and there beat, strike, kick, cut and wound, with intent, him, the said Eugene Best, then and there feloni-

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ously and willfully to kill and murder, and other wrongs to the said Eugene Best then and there did, to the great damage of the said Eugene Best, contrary to the form of the statute of the State of New York, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Abraham Davis and the said James Dumond, on the said nineteenth day of November, in the said year of our Lord, 1857, with force and arms, at the said town of Kingston, in and upon the said Eugene Best, feloniously did make an assault; and they, the said Abraham Davis and the said James Dumond, with deadly and dangerous weapons, to the jurors unknown, which the said Abraham Davis and James Dumond then and there had and held in their hands, feloniously did beat, strike, cut and wound, with intent, him, the said Eugene Best, then and there feloniously and willfully to kill and murder, and other wrongs then and there did, to the great damage of the said Eugene Best, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Abraham Davis and the said James Dumond, of the place aforesaid, on the said nineteenth day of November, 1857, with force and arms, in and upon the body of the said Eugene Best, feloniously did make an assault; and they, the said Abraham Davis and the said James Dumond, with deadly and dangerous weapons, to the jurors unknown, which the said Abraham Davis and the said James Dumond then and there had and held in their hands, feloniously did strike, beat, cut and wound the said Eugene Best, with intent, him, the said Eugene Best, then and there feloniously and willfully to maim, and other wrongs then and there did, to the great damage of the said Eugene Best, contrary to the form of the statute of the State of New York in such case made and provided, and against the peace of the People of the State of New York and their dignity.

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And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Abraham Davis and the said James Dumond, of Kingston, aforesaid, on the nineteenth day of November, aforesaid, in the year 1857, with force and arms, in and upon the said Eugene Best, feloniously did make an assault; and they, the said Abraham Davis and the said James Dumond, with their fists and feet, did then and there beat, strike, kick, cut, wound and maim the said Eugene Best, so that his life was greatly despaired of, and other wrongs to the said Eugene then and there did, to the great damage of the said Eugene Best, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

J. D. SHAFER, *District Attorney.*

The prisoner pleaded not guilty, and the cause came on for trial in said Court of Sessions, on the 13th of March, 1858.

After the district attorney had introduced the evidence in behalf of the prosecution and rested the case, the counsel for the prisoner insisted that a conviction for assault and battery *with intent to kill* could not be had, on the ground that there was not sufficient evidence of such intent, and asked the court so to direct the jury. But the court refused so to direct the jury, and decided that the evidence was sufficient; to which ruling the counsel for the prisoner excepted.

Witnesses were then examined on the part of the prisoner, and further testimony taken on behalf of the prosecution.

After the evidence was closed, the counsel for the prisoner again insisted that a conviction on the aforesaid indictment could not be had for assault and battery with intent to maim, or for assault and battery with intent to kill, on the ground that there was not sufficient evidence of said intent, and asked the court so to direct the jury, whereupon the court refused so to do, but decided that the evidence *was sufficient*; to which ruling of the court the counsel for the prisoner excepted.

The counsel for the prisoner also asked the court to charge the jury that, as the evidence in the case shows that an injury

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of the kind proven might be produced by a blow or blows with the fist, that the jury ought not to infer that the injury was occasioned by a blow or blows with a deadly or dangerous weapon in the absence of proof that such weapon was used. The court refused so to charge. To which decision the counsel for the prisoner excepted.

The court, however, did charge the jury, that if it was likely or probable that the injury to Best could have been produced by the fist, then the jury were not authorized to presume a weapon was used. That in criminal cases the prisoner was entitled to the benefit of any reasonable doubt, and if the jury had any reasonable doubt as to his participation in the occurrence, they should acquit him; and if they had any reasonable doubt as to the intention to kill, they could only convict him of an assault and battery, provided they came to the conclusion that the defendant participated in the transaction.

The jury found the prisoner guilty of an "assault and battery with intent to kill."

Amasa J. Parker, for the prisoner.

I. The court erred in deciding when the People rested, and again when the evidence was closed, that *there was sufficient* evidence of an intent to kill. This was decided *as matter of law* in the presence of the jury, and was in fact a charge to the jury. This decision convicted the defendant of felony. The court had no right thus to decide a question of fact. The court did not decide that there was sufficient evidence to go to the jury, but sufficient to convict. The existence of an intent to kill is a question of fact and not of law.

II. There was not a particle of evidence of an intent to kill, nor any evidence from which it could legally be inferred. 1. The law presumes that "a man intends the natural consequences of his own acts"—that is, that a man intended to do what he did do—nothing more. (*Wharton's Am. Cr. L.*, 8d ed., 331, 292.) The defendant committed an assault and battery; he did not kill. The law will presume he intended to commit

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an assault and battery, and no more. If any intent beyond the act done is claimed, it must be proved by *additional* circumstances, as that the prisoner had previously threatened to kill; that he used a deadly weapon, and aimed at a vital part of the body; that he had lain in wait for him, and secretly watched him, &c., &c. (*Barb. Cr. Law*, 87, 88; *Arch. Cr. Pl.*, 104.) 2. Here is not only an absence of all such additional circumstances, but the circumstances of the transaction show that there was no intent to kill. Would a person intending to take life strike on the side of the jaw? And with his fist? Would he act without secrecy, in a public place, with witnesses all around in sight and hearing? Does any one believe that Davis really intended to kill Best? 3. There is no proof that defendant had a weapon of any kind, and the law will not presume it, especially when a witness states that jaws have been broken in prize fights with the fist. 4. "The intent forming the gist of the offence must be specifically proved." (*Wharton Am. Cr. L.*, 551; 3 *Harrington, Del.*, 577; 13 *Smedes & Marsh*, 242; 24 *Miss.*, 54; *Addison R., Penn.*, 30.)

III. The jury found the defendant guilty of an assault and battery *with intent to kill*. The verdict makes no reference to the indictment to help it out. There must be something more than an intent to kill. It must be an assault made with fire-arms or an air-gun, or any deadly weapon, "or by such other means or force as was likely to produce death." (2 *R. S.*, 665, § 36.) This is a necessary ingredient of the crime. A *mere intent* is not punishable in earthly tribunals. They take cognizance only when the intent is displayed in certain prescribed and very dangerous *overt* acts. It will not be claimed that striking with the fist on the side of the jaw was such means as was *likely* to produce death. The court, as well as the jury, evidently overlooked the requirements of the statute.

IV. The court erred in refusing to charge as requested, viz.: that as it was proven the injury might be produced by a blow of the fist, the jury ought not, in the absence of proof, to infer that a deadly or dangerous weapon was used. There can be

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no protection for the innocent if the most material fact constituting the crime can be inferred in the absence of proof.

V. The jury should have convicted of an assault and battery only, and not of a felony punishable by ten years' imprisonment; and the proceedings should be reversed and a new trial ordered.

J. D. Shafer (District Attorney), for the People.

I. The prisoner was legally convicted of an assault and battery with intent to kill. 1. The jury had a right to infer from the evidence that a dangerous weapon was used. 2. It appears from the evidence that both Davis and Dumond had had previous difficulty with Best, and that he apprehended an attack from them. 3. It was done on a dark and stormy night. The expression used by one of them to the other, just before the assault, as well as at the time of it, shows the existence of a concerted murderous design between them. 4. The associations and conduct of the prisoner at that time and previous, warrant the same conclusion.

II. If a deadly weapon is used, an intent to kill is to be inferred. If no weapon is used, then the question is, was there excessive violence. From continued violence and much beating, an intention to kill may be inferred. (The case of *Macklin and others*, 2d *Lewin's Crown Cases*, 225; 4 *Black. Com.*, 200.)

III. The act, taken together, shows malice, and had a fatal result attended it, it would have been murder. (9 *Metcalf*, 93; 13 *Wend.*, 159; 1 *Rus. on Crimes*, 614, note 1.)

IV. The jury found, as a question of fact, that the prisoner did the act with intent to kill; that verdict is conclusive. 1. Where the question is one of doubt, a new trial will not be granted. (5 *Wend.*, 48; 2 *Wend.*, 352; 4 *Yerger*, 152; 1 *Cow.*, 251; 11 *Cow.*, 440; 6 *Cow.*, 682; 2 *Price*, 282; 1 *Burr.*, 54.) 2. The question of malice and intent to kill, if a question of fact or a mixed question of law and fact, is a question for the jury. (*Wharton's Crim. Law*, 637; 2 *Scott*, 369; 2 *Stew. & Porter*, 193; 1 *Greenl. R.*, 135.) 3. The finding of the jury is

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conclusive on a question of fact, although it appear affirmatively that the bill of exceptions contain all the evidence. (*Colt v. The People*, 1 *Park. Crim. R.*, 621, per *Chan. Walworth*.)

4. That the prisoner used a dangerous weapon may well have been inferred by the jury, if such inference was necessary to convict of assault and battery with intent to kill. The verdict in that case is clearly final. (*People v. Vinegar*, 2 *Park. Crim. R.*, 24.)

V. The prisoner was legally convicted of assault and battery with intent to kill, even if the crime, in case of Best's dying of the wound, would have been manslaughter only. (1 *Park. Crim. R.*, 327.) The change of the words "to murder," in the Revised Laws, to the words "to kill," in the Revised Statutes, shows an intention of the Legislature to extend the meaning of the term "to kill" to any of the various degrees of felonious homicide.

VI. The court cannot be required to give an opinion or direct the jury on a mixed question of law and fact, and a refusal to do so is no error. (*Wharton's Crim. Law*, 637; 2 *Scott*, 359; 2 *Stew. & Porter*, 193; 1 *Greenl. R.*, 135.) 1. The office of a bill of exceptions in criminal cases, is to bring up for review questions of law only, made and decided on the trial. (20 *Bar. R.*, 597.) 2. No bill of exceptions can be taken in criminal cases to authorize a superior court to correct an erroneous opinion of the court below, or the decision of a jury upon a matter of fact. The remedy for the party who is injured by an erroneous finding of a jury on a question of fact, is an application for a new trial on a writ of error. (11 *Wend.*, 557; 14 *Wend.*, 546, and cases there cited.)

VII. For offences greater than misdemeanor, a new trial cannot be granted on the merits, whether the accused be convicted or acquitted. (*People v. Comstock*, 8 *Wend.*, 549; 6th *Term R.*, 625; *Chitty's Crim. Law*, 532; 18th *East R.*; *Barb. Crim. Law*, 323.)

By the Court, GOULD, J. As I understand the prisoner's different requests to charge, they were requests to charge the facts, and were properly refused. And as to the first one,

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where the judge said the evidence was sufficient, it is perfectly apparent, from the connection, that he meant merely sufficient to go to the jury.

But there are inherent in the case much more serious difficulties in the way of the conviction of a felony.

The third count of the indictment, to make it in itself good, should have after the word "kick," the words "with such force as was likely to produce death," and then a general verdict of "guilty of assault and battery with intent to kill," *as charged in the third count of the indictment*, would probably be good. And it is worth the while of every district attorney to observe this point, and in framing his indictment for cases of assault and battery, so outrageous as plainly was that in this case, to insert a count on which a conviction that will send to the state prison may be had, without calling on the jury to presume, or find from circumstances hardly warranting such finding, that some unknown deadly weapon was used.

The offence is strictly a statute offence. (2 R. S., 665, § 36.) "Every person who shall be convicted of any assault and battery upon another, by means of any deadly weapon, or by such other means *or force* as was likely to produce death, with intent to kill, &c., shall be punished," &c. And no one can doubt that were a strong man to strike with but his fist a heavy blow on the head of a mere child, thereby inflicting severe injury and intense suffering, whether causing or not causing immediate danger to its life, he would clearly be within both the letter and the spirit of committing an assault and battery by such force as was likely to produce death; and eminently worthy of the state prison, for the longest term the law names, would be so brutal a wretch.

Still, unless the indictment were formed to meet the case, there could be no such conviction, and merely charging "an intent to kill," without setting forth some of the means which the statute names, will not warrant a conviction of any offence higher than assault and battery. And in this light, I am unable to see that the verdict is really one finding any grade of crime above an assault and battery; the words "with intent to

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kill," having added to them no reference to the indictment whereby the finding could be eked out with the statute requisitions, are merely nugatory. The true and proper way of finding a verdict in a case properly charging the statute intent, would be "that the prisoner was guilty of the assault and battery with a deadly weapon with intent to kill," or "by such force as was likely to produce death, with intent to kill" the person assaulted; and the very least that would make a good verdict of guilty of the higher crime, would be guilty of assault and battery with intent to kill, *as charged in the indictment.*

Viewing the verdict, then, as one of assault and battery, I see no course to be taken with it but that sentence be passed for that offence.

There has been no error for which a new trial should be had, nor is there any conviction of a felony, but there is a perfectly valid conviction of the lesser offence.

Proceedings affirmed.

SUPREME COURT. Monroe General Term, September, 1858. *Johnson, Welles and Smith*, Justices.

IRA STOUT, plaintiff in error, *v.* THE PEOPLE, defendants in error.

To sustain a challenge for *principal cause*, on the ground that the juror has formed and expressed an opinion, it must appear that the opinion was absolute, unconditional, definite and settled; it is not enough that it was hypothetical, conditional, indefinite and uncertain. If the opinion belong to the latter class, it is a proper subject for a challenge *to the favor*.

Where, on a trial for murder, a juror who was drawn was challenged by the prisoner for principal cause, on the ground that he had formed and expressed an opinion, and such challenge was traversed by the public prosecutor, and it appeared by the testimony of the juror, who was called upon as a witness to prove the truth of the challenge, that he thought he had an impression as to the prisoner's guilt or innocence; that he rather thought he had formed an opinion; that he presumed he had expressed it, and thought he retained it; that he had formed an opinion, if the newspaper accounts of the transaction, of which he had read only a part, were true, and that so far as he read he gave them credence; that it might or might not require evidence to remove his impression of the prisoner's guilt; that he had not arrived at any definite opinion, and the court overruled the challenge, and decided the juror to be competent, it was held on review that the decision was correct.

In all challenges for principal cause and for favor, the matter of fact upon which the challenge is founded must be specified when the challenge is interposed, or the court should disregard it. Such matter of fact may be traversed, presenting a question of fact for decision, or the party may demur, thus admitting the truth of the allegation.

It is most convenient for the dispatch of business, and in accordance with the customary practice at the Circuit and Oyer and Terminer, that a challenge for principal cause, resting upon a disputed question of fact, should be decided by the court, though such a question may, like a challenge for favor, be referred to triers for determination; and when such a question has been determined by the court, without objection from either party, the court will be deemed to have acted by the consent of counsel on both sides, and its right thus to act cannot afterwards be questioned. *Per SMITH, J.*

On a trial for felony, it is not a valid objection to evidence by the prosecution of a fact otherwise competent, that it would tend to prove the prisoner guilty of a distinct and different felony. }

The prisoner and his sister, Mrs. L., were indicted for the murder of L. On the separate trial of the prisoner, evidence was given tending strongly to show that the prisoner and Mrs. L. were both present at the homicide, and that it was the result of a violent struggle, in which all three were in some way

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engaged; that the deceased had been jealous of his wife; that they had lived unhappily together, and had quarrelled, and had partially separated; and that she had applied to an attorney to procure a divorce from her husband. The prosecution then offered evidence tending to show an incestuous connection between the prisoner and Mrs. L. during the few months immediately preceding the homicide: *Held*, that such evidence was competent on the question of motive.

THIS case came before the general term on a writ of error to the Monroe Oyer and Terminer, in which court the prisoner, together with Sarah Littles, his sister, had been indicted for the murder of Charles W. Littles.

The prisoner was tried separately on the indictment, at the Monroe Oyer and Terminer at Rochester, on the 14th of April, 1858, before *Henry Welles*, justice of the Supreme Court, *George G. Munger*, county judge, and *Ephraim Goss* and *James Swayne*, justices of the Sessions. (a)

In proceeding to empanel a jury to try the prisoner,

Johnson M. Tower was drawn and called as a juror, and was challenged by the prisoner for principal cause, on the ground that he had formed and expressed an opinion touching the guilt of the prisoner, and the district attorney traversed the challenge. The juror being sworn and examined as a witness on behalf of the prisoner, testified: I have read part of the accounts of the transaction in the newspapers; I think I have an impression as to the defendant's guilt or innocence; I rather think I have formed an opinion; I presume I have expressed it; I think I retain it.

On his cross-examination, he testified: I formed an opinion if the accounts were true; I rather thought that they were true; so far as I read I gave them credence.

On his re-direct examination, he testified: I rather think I believed the accounts true; it might or it might not require evidence to remove my impression of the defendant's guilt.

To the court: I did not arrive at a definite opinion. The court thereupon overruled the challenge, and the prisoner

(a) The opinion of the Oyer and Terminer, upon an interesting question which arose on the trial, will be found in 3 *Park. Crim. Rep.*, 670.

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excepted. The juror was then challenged for favor, and after evidence offered to them, arguments of counsel, and charge by the court, the triers found the juror indifferent, and he was sworn as a juror, and sat as such during the trial.

After a jury was empaneled, the district attorney called on the part of the prosecution, *John Quin* as a witness, who, being sworn, testified as follows: I was coroner of this county during the month of December last; I held an inquest on the body of Charles W. Littles, commencing the 20th of December last, Sunday morning; I found the body in the Genesee river, near what is called Sharpe's Quarry, on the bank of the river. The quarry is on the hill excavated out of the solid rock. There is an alley leading from St. Paul street to the bank of the river passing the quarry. The alley runs a little north of west. The quarry is on the north side of the alley, on the top of the bank. On the bank south of the alley there was an elevated piece of ground, triangular in shape, at the east end, six or seven feet higher than the alley, at the edge of the river bank eighteen or twenty feet higher than the alley. The alley there is a mere roadway the width of a wagon. The triangular plat is very nearly level; the difference in height is made by the descent of the roadway. The plat is a grass plat. I have never measured it. I should judge that on the south line and north line it was very nearly equal, perhaps the south line sixty feet and the north line eighty feet long. There was a fence on the south line. The river line I should judge to be about forty feet. The fence was fastened to a tree which stood on the edge of the bank; the fence projected over the edge of the bank five or six feet; the tree projected out, and to that the fence was nailed. The bank became more naked and destitute of shrubbery as it went northward. Below there was a little elevation or knoll which appeared to be the droppings of the bank; it was grassed over considerable. I undertook to measure the perpendicular distance once, and called it thirty feet. The knoll might be three feet high. The perpendicular distance from the grass plat to the base of the knoll, I called thirty feet. A few feet at the top edge of the bank there is a

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steep slope—too steep to stand on. From the knoll down is very rough, and it is very steep; it is rugged and rough with rocks to the river's edge. When the river is low I should think it is one hundred and eighty or two hundred feet to the water. When high the water rises perhaps twenty feet upon the bank. It is sixty or seventy degrees steep. There is a large rock about half way down the bank, and the bank is steeper from the rock upward than from the rock down towards the water's edge. Its appearance at the time was dry, with some shrubbery, burdocks, stones, and some grass. It is a ragged and rough surface, the whole of it. The river was then very high. The body was in the water, in sufficient depth of water to float it. From the water's edge there is a foot-path up to the top of the bank, made by people carrying flood-wood. It begins near where the body was found, and comes out at the top of the bank two hundred feet northward from the tree; it comes up into the bottom of the quarry. The body lay with the head down stream; he was dead; it appeared water-washed a good deal; his clothes were buttoned up high, overcoat, undercoat and vest; the coat was buttoned clear up to the chin; he had boots on; standing on the shore you could see that the skull was broken; it had two wounds on the top of the forehead; a part of the skull was gone, perhaps an inch and three-quarters square was gone; I afterwards found a piece of the skull on the steep slope between the rock and the little knoll. There was a track from the base of the knoll, in a zig-zag course, down the bank to the flat rock, as though something had been dragged along; there was blood on the rock; there appeared to be a good deal, and you could see where it ran off on the edge of the rock on to the ground; there was some blood from the base of the knoll to the rock, but not so much; from the rock to the water, or to within about ten feet of the water, the track continued, and there was another pool of blood; there was nothing from this pool of blood to the river; the shore was pebbles; the grass and stuff through the track was broken down and flattened; there was blood on the top of the grass plat; the first spot was very near where you ascend from the alley way to

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the grass plat; after you get up, it was ten feet from the steps where people stepped up, and might be three or four feet from the north edge of the bank; there was a large pool of blood there, as though there might be a quart of blood there; there was a track of a heel of a boot in the blood, and also the arm of a chair; there was a track or trail from that leading towards the fence and towards the river bank; there was another pool of blood midway between the first pool and the river bank; this appeared to be more scattering than the other; I picked up the chair arm, and have it now; the track shows visibly from where the first pool of blood was to the face of the bank near to the tree, and close to the fence; it was continuous from the first blood spot to the second, and on to the edge of the bank; the fence was a tight board fence, six feet high.

I was at the place about half-past seven in the morning of the 20th December; the body was brought by me to the police office; the body had on, among other things, a dagger in a pocket in the inside of the under-coat.

On his *cross-examination* by prisoner's counsel, he testified: There were people walking on the grass plat at the time I examined it; on the grass plat on the morning in question; I have described all the marks visible, except some indentations in the fence, which looked as though made by a stone. The marks were made by a stone about one-quarter of an inch in depth; I do not know whether the wood looked newly broke or not; I did not see any stones on the grass plat; most of the marks were between the pools of blood; could not have been far from the first pool of blood.

Henry P. Hapgood, sworn for the People, testified: I knew Charles W. Littles; the time he was found dead was the morning of the 20th December, 1857, on the edge of the river opposite the north line of the Falls Field; when I went down there I found no one present except Mr. Quin; I looked at the general appearance of the ground from the shore to the large flat rock; the ground was composed of stones, and they were covered with blood from the edge of the river to this rock; I examined the flat rock and saw that there was a large quantity

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of blood on it; I then went upon the grass plat, at the east end near the fence; there was a path up there which appeared to have been used quite frequently; I should think it was not very difficult to ascend; when I got up there I found two pools of blood on the grass; the west pool about seven feet from the fence and forty feet from the brink; the other was five or six feet east of that, and a little nigher the fence, and I should think ten or twelve feet from where I went up, and some three or four feet from the edge of the bank; this grass plat is seven, eight or nine feet higher than the roadway directly opposite the east blood mark.

The prosecution offered further evidence describing the grass plat, the blood spots thereon, the track or depression of the grass leading from the pools of blood to the brink of the precipice, and introduced, in evidence, a map of that part of the city of Rochester, containing the place of the homicide, and the streets leading therefrom to the house of defendant on Monroe street, which distance is about two miles.

Dr. Avery and *Dr. Harvey F. Montgomery*, were then called, and testified, that they made a post-mortem examination of the body of Charles W. Little on the forenoon of 20th of December, and they produced the skull cap of said Little, and described the appearance of the wounds on the head to be several fractures on the skull and wounds on the scalp of a peculiar nature, one of which, they both testified, would have immediately produced death. They gave it as their professional opinion that these wounds were produced by more than one heavy blow, which blows appeared to have been given perpendicular to the skull at the place of the fracture. They also described several slight abrasions of the skin on other parts of the deceased's body.

Jane Stout, called and sworn for the People, testified: I know the prisoner; am a sister-in-law of his, the wife of Eli Stout; Eli Stout is prisoner's brother; Mrs. Sarah Little is a sister of the prisoner; I have known the defendant about four years; he resided in Owego about four years ago; he came to Rochester to live about July or August last. [It was here con-

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ceded by the defendant that he was absent from the family during five years prior to July last, and did not see any of them.] I knew Charles W. Littles; I have known him about four years; three years ago this April he married Sarah; in December last the family resided at No. 75 Monroe street; after the marriage of Littles with Sarah, he resided with our family from April, when they were married, until the latter part of summer; he and his wife then went from our house to Mrs. Cunningham's boarding house on Main street; I don't know how long they remained there; I think they stayed there all winter; he sent his wife to Dansville twice while they were boarding at Mrs. Cunningham's; after they came back from Dansville they resided with the family; they resided there two or three months after I came home; we moved then on to Andrews street; Mr. and Mrs. Littles then lived with the family; Littles was sick there two or three weeks; this was last summer; the family moved on Andrews street in the spring, and moved from there on to Monroe street last fall; they moved to Monroe street I think in August, and remained there until through December; Littles did not come to the Monroe Street House to stay all the time as he did before; Mrs. Littles lived there during that time from August to December; I remember the 19th of December last; on the morning of that day all the family were at the house; Mrs. Margaret Stout, Ira, Eli, Sarah Littles, Frances, Charles, Mr. Littles, and myself; I believe mother, Eli, Ira and myself took breakfast together; Mr. and Mrs. Littles afterwards took a cup of coffee; I was not at home all that day; I went away in the afternoon about half past two, and returned about six in the evening; I can't say how late Ira left that morning; I saw him that morning about eight; I do not know when Littles left; I was at home at noon; Ira was not at home; Sarah was there; after seeing Ira about eight o'clock in the morning, I next saw him in the afternoon at the house before I went down into the city; mother was there then, Frances, Mrs. Littles and myself; I next saw him after that at the tea-table on my return from down town; Frances, Charles, Mrs. Margaret Stout, Ira, Eli and myself took tea there; I

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had not seen Littles from the time he left in the morning; we took tea about six o'clock; I cannot tell who left the table first; I did not notice when Mrs. Littles left the table; I did not see her after she left the table; I saw Ira after he left the table; I don't know where he went; he went and got a shawl; he went into another room to get the shawl; I saw him in the kitchen after he went into that room; he left the house after six, perhaps half-past six; nobody left with him that I know of; he left after Mrs. Littles left the tea-table; I left the house that night with my husband; we went to the Glass Blowers, on the corner of Fitzhugh street; we got home before ten; when I got home I found mother and Franky and my baby; they were in the kitchen; I remained there awhile and then went out into an adjoining street; I don't know how far I went. The witness then testified that she met Ira and Sarah on Union street going towards the house. I was absent from the house about twenty minutes; when I returned I went through the front door and hall and sitting-room into the kitchen; mother was in the kitchen when I went in; I found mother there, also Eli; my husband and I then went to bed; we went to bed in the room over the sitting-room; I had never slept there before; it was Ira's room; our room was over the front room; our little girl did not go with us just then; she went up afterwards; mother brought her up some time afterward; my husband and I got up when we were called; we went down into the kitchen, and found there mother and Ira and Sarah; when I first went into the room Ira was lying down on the floor; I don't know whether Sarah was standing up or sitting down; Eli went after the doctor; it was a little while before he started; there were a few scratches on Ira's face—the skin was torn; his right arm was hurt; he thought his arm was broken; I saw his arm afterwards; it was broken between his shoulder and the elbow; I don't know whether he had his boots on; when I first saw him he had his two coats on; they were taken off by the doctor and Eli; Ira felt sick and faint.

Q. Did you see any marks upon Mrs. Littles? Objected to by prisoner's counsel; objection overruled, and prisoner excepted.

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A. I noticed Mrs. Littles' face; it was bruised some; her face was black and blue on the nose; I think the skin was torn; it seemed to me on both sides of the nose; she showed me her hand, and I saw it was swollen—her left hand I believe; I did not notice any blood on her clothes; Dr. Rapalje came first about twelve o'clock; he went away and got another doctor; Dr. Whitbeck came with Dr. Rapalje the second time; they set Ira's arm; Ira did not say how the injury happened to him; I don't remember that he at any time said how the injury happened; I only remember of Ira saying that he felt very bad, and that he thought his arm was broken; I think Ira said he could not get up, for he was faint; I asked him how it occurred; don't recollect that he made any answer; I asked Sarah, and she told me; we were all together; I did not hear Ira say anything that night but what I have stated.

Q. Did you say to Ira that you met him on Union street, and he replied yes, I know it? Question objected to by prisoner's counsel; question allowed, and prisoner excepted.

A. It seems to me that I remember that; I think he did tell me that he fell on Galusha street; I went to bed again about half past three or four; Eli went to bed right after the doctor came.

Q. What had Mrs. Littles on when you came into the room? Question objected to by the prisoner's counsel; objection overruled, and prisoner excepted.

A. A black satin skirt; I don't know what waist she had on; I had not heard Ira saying anything about Mrs. Littles going away; I think I heard Mrs. Littles and Ira talking about her going west; Mr. and Mrs. Littles had lived apart considerable; they separated more than once; I only know that they separated more than once; this was when they lived on Andrews street; Littles did not live at the house on Monroe street previous to the 19th of December; he stayed there some; he was there a good deal of the time; he used to come there and stay; I believe that he stayed there the night previous to the 19th; he and Mrs. Littles occupied the front room; he used to stay there the biggest part of the time; used to come afternoons;

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when we first moved there he didn't use to stay there nights at all; there were difficulties between Mr. and Mrs. Littles; it commenced when he was sick on Andrews street; Littles got mad at her and took her watch away.

Q. Do you know of her going to Mr. Trimmer's office? Question objected to. District Attorney states that he intends to show that she went to inaugurate proceedings for a divorce. Objection overruled, and prisoner excepted.

A. She did, to see about getting a divorce; it was last June; I went with her; Mr. Trimmer is a lawyer; she found that she couldn't get one; sometimes Mr. and Mrs. Littles were friendly, and sometimes not; they always talked with each other; I have heard Mrs. Littles speak to Ira of her difficulties with her husband; there is a front hall in the house leading from front door to middle room; there is a bedroom off the middle room; mother, Frances and Charley occupied that room; my husband's room and mine was over the parlor or front room; the room we slept in the night of the 19th was over the middle or sitting-room; there was a bed in the lower front room or parlor; Mrs. Littles occupied that; defendant's room was over the sitting-room where I was that night; I believe Mr. Littles slept with Sarah when he was at the house; believe I never saw Ira in bed in other rooms than his own; saw him in bed, the morning he was hurt, down stairs in the sitting-room; the bed had been removed from the parlor to that room.

Q. Do you know whether Ira and Mrs. Littles ever slept together?

Question objected to by prisoner's counsel. Objection overruled, and prisoner excepted.

A. I don't wish to answer. The Court.—You must answer.

A. I never saw them sleep together.

Q. Did you ever see them in bed together? (The answers to these questions were taken subject to the last objection.) I have seen them on the bed together. Question repeated. *A.* I have seen them in bed together; I don't know how often; not a quarter of the time; two or three times; I don't know that they slept together all night, and don't know that they

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slept; I never saw them in bed together except in one bed—the bed down stairs in the front room.

On her *cross-examination* by prisoner's counsel, she testified: Mr. and Mrs. Littles were married three years ago this month; the family was then living on North Clinton street; after they were married they first lived with us; they immediately began to live with the family; in August next they went to board at Mrs. Cunningham's, and remained there four or six months; Mrs. Littles then went to Dansville to visit her husband's parents; she came back and Littles and she went again; her first visit was three or four weeks; when she returned she went to Mrs. Cunningham's; Mr. Littles was there; he stayed there while his wife was in Dansville; they remained in Dansville four or five months; I believe it was in the next fall they came back; I was not here at the time; I was in Owego; I returned in February, a year ago last February; when I came home Mr. and Mrs. Littles were living with the family on Water street; my husband and I went there to live, and the whole family was then living together; we moved from there on to Andrews street, and Mr. and Mrs. Littles went there; the family lived there until last August, and then moved to the house on Monroe street; Mr. and Mrs. Littles lived with the family on Andrews street most of the time; she lived there all the time during that summer; that was his general place of sleeping and taking his meals; he generally took his meals with the family; he and his wife occupied the same room; he was sick during the time on Andrews street, for three, or four weeks; was confined to his bed most of the time; Mrs. Littles was there at the time, and nursed, and watched and attended him; she was with him almost constantly; the disease was of a private nature; it was a venereal disease; it was after that that he left the house; we were living on Andrews street when Ira came home; as near as I can recollect it was in the latter part of July; Ira then came to live with the family; he lived there till we moved on Monroe street; after Ira came back, Mr. Littles' connection with the family continued; Ira went with the family when they moved to Monroe street; Mr.

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Littles did not go with the family when they went to Monroe street; he did not come there to board and live as he used to do; he came, however, quite often; was there most of the time; it was a month before the 19th of December that he began to come quite often; he used to come most every day; he frequently took meals there, and sometimes slept there; the first two or three weeks we were on Monroe street, he did not come at all; after that he came quite often; I think that during the last month he slept there perhaps four nights in the week; when he was there he and his wife occupied the same room; Ira was then in the family; he was then attending Eastman's Commercial College; Ira and Mr. Littles had met at our house; they associated together considerably; I have seen them together almost every day; their intercourse was friendly; I never saw any difficulty or disturbance between them; they would come and go from the house together; I have seen them talking together in the house; I saw Ira and Sarah in bed together, first time, in the morning, on Monroe street, right after we moved up to that house; believe I did not see them in bed together except immediately after we moved up there; they were not in the bed together the last time; I was sitting in the room; Sarah was lying on the bed reading, and Ira was lying across the foot of the bed; saw them in bed together once after that, quite a little while; it was down stairs in the front room; they were in the bed; it was in the morning; didn't notice whether they were undressed; I suppose I have seen them in bed together at other times; once after that I remember; I remember three times; the last time was in the evening early; when Ira and Sarah were in bed together it was known to the whole family; don't know that Littles knew it.

On re-direct examination, witness testified: I don't know that I testified before the coroner that I saw Ira and Sarah in bed together within a month; I may have seen them in bed together within a month of the time of the coroner's jury; I should think it might be; I heard defendant's mother speak to him once or twice about sleeping with Sarah; she told him he

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ought not to do it; I saw Mrs. Littles' victorine at the police office; also her basque and satin skirt.

Margaret Stout, called and sworn as a witness for the People, testified: I reside in the city, and have for five years past; I am the mother of the prisoner, and of Eli, Mrs. Littles, and two other children: Ira came here last August; Sarah married Mr. Littles three years ago; we were living on Andrews street when Ira came home; Mr. Littles came right to our house on his marriage, and lived until July; he then went on to Main street to Mrs. Cunningham's; he and Sarah boarded there; they after that went to Dansville; then she came home from there before Mr. Littles; he came four or six weeks afterwards; when Mr. Littles came home, they stayed with me until along in June last; after that she stayed with me and he went away; he would be gone a day or two and then come back; he would come back every day or two, and sometimes once in two or three days; he has never regularly boarded with me since; Sarah remained with me always since; it wouldn't be more than a day or so that Littles would not come to the house; last November and December he would come about every night and stay all night; during the week previous to the 19th of December, I think Mr. Littles was at the house every night and stayed all night; Mrs. Littles and he occupied the same room; he stayed there the Friday night before the 19th of December last, and occupied the same room with his wife; I think he took a cup of coffee the Saturday morning; he left that morning about 8 o'clock; Eli went early; Ira went before 8; Ira returned after his school was out, about 2 in the afternoon; he did not generally come home until evening; when he came home there was Jane and Frances, myself and Mrs. Littles; Jane went down street; Sarah that afternoon sewed up a pair of cloth gaiters, and then she sewed up a pair of gentleman's slippers; Ira went down street and got me some buckwheat flour; he was gone an hour or an hour and a half and then he went down again and got me some groceries; he didn't get back until most tea time; I think Ira and Sarah were in the middle room together about half an hour, but per,

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haps less; it was after he went after the flour; all my family took tea that evening at, I think, about 6 o'clock; Sarah left the tea table first; she went into the front room, dressed herself, and went down to the city; she had on a pink bonnet and black satin skirt, and a broadcloth basque, and a victorine, and a cameo breastpin; she left first; went out alone; Ira left a little before seven; he had on a black undercoat and brown overcoat, and an oilcloth cap; I guess he had on his spectacles; he generally wore them; he went out the same door that Sarah did—the front door; he lived with me ever since he came to Rochester; Eli and Jane went to the Glass Blowers a little after seven; Eli and Jane got home about 10; I did not know when Ira and Sarah got home; I should think it was between half-past 10 and 11 when I first knew Ira was at home; I did not hear them come in; when I first saw them they were in the front room; they were lying on the bed; there was no light; she called for a light, and I took one; Sarah took it and came out into the kitchen; she was not undressed; Ira was not undressed; she then told me that Ira broke his arm; Ira then came out and sat down in a chair; Ira said he was faint, and I took him and laid him down on the floor; I took hold of his hand; he said his arm was broken; I told him that we would have to have the doctor and have it set; he said I should wait a few minutes until he felt better; I then went and made some splinters; I then made a fire, and got in the sofa into the kitchen; I then got him on to the sofa; I then called Eli, and he came down and went for the doctor; Jane also came down; Dr. Rapalje then came, and said he could not set it alone, and they went after another; Ira then asked me to go down on the Falls Field and get his cap; I told him that I had never been down there, and that I dare not go down there; he then asked me if Charles wouldn't go; I went and called Charles up; I called him up about half-past five; I went down to the Falls Field with him; the gas lamps in the streets were lighted when we went down; when I went down I went on the hill and came back, and Charles went down the path; I turned and came away as Charles started to go down the

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bank ; Charles overtook me before I got home ; he had Ira's cap and Sarah's breastpin ; when we got home we found Sarah and Ira in the kitchen ; that was all that was up ; Charles brought the cap and pin home, and I hung up the cap, and Sarah put the pin in her pocket ; Charles said he had found the cap and pin, and I don't remember that Ira said anything ; Charles said he found the cap and pin under the hill at the Falls Field ; it was the same cap that Ira wore when he went away that evening ; before we went down Ira said he lost his glasses ; Charles told him after he got back that he did not find them ; Charles said that they had found a man down there that was drowned the day before ; Ira did not make any answer ; pretty soon a man came and said before us all that they had found Mr. Littles down the river ; I don't remember as Ira said anything ; then the officers came, and we all went down to the police office ; before going to the Falls Field, Sarah spoke of getting the pin ; she either told me or Charley ; it was at the same time that Ira told me to get the cap ; when Ira told me to get the cap, he said that it would be found down under the Falls Field ; Sarah said her pin had broken off there where she fell. [Here a pair of spectacles and cameo breast-pin, found at the base of the precipice below Falls Field, were shown to the witness, who said the pin was Sarah's, and she thought the spectacles were Ira's.] When Ira came home I did not see anything the matter with him, except that his arm was broken ; there may have been a little scratch on the face ; Sarah was bruised pretty badly on her leg and face, one of her arms was hurt pretty much, and she said it was broken ; Ira's right arm, and Sarah's left arm was broken ; I do not remember anything about Ira's pantaloons ; did not notice that his clothes had blood on ; Sarah had some on her basque and on her clothes ; she fetched her basque to me and wanted I should clean it off ; I cleaned off a couple of spots, and then told her to hang it away until after breakfast, and then I would fix it ; when they first came home I asked Ira how he hurt him, and he said he fell on Galusha street ; he said they were walking pretty fast, and they slipped and fell, and Sarah fell over him ;

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Sarah and her husband didn't live very agreeably together part of the time; Sarah and he separated as much as three times; when they first separated they lived on Main street; the second time was when she came home from Dansville, and the third time was when they lived on Andrews street; I think that Sarah told Ira of her difficulties; we talked of it a good deal in the family; Ira was present; Ira said she ought to overlook his faults and live with him; this was when he first came home, and sometime after that, Ira said that he thought Littles used Sarah "real mean;" Littles and Sarah slept in the front room of the house on Monroe street; Eli and his wife slept in the front room up stairs; Charles and Frances slept with me in room off the sitting room; Ira in the back chamber, and Mrs. Littles in the front room below.

Q. Did Ira and Sarah sleep in any other way than you have named? Question objected to by prisoner's counsel. Objection overruled, and prisoner excepted.

A. They used to sleep together once in a while; I don't think they did but once or twice without the children were with them; sometimes up stairs they and the children all slept together, and sometimes below; Littles knew that they slept together once, and I don't know but always; he never said anything about it as I know of; he saw them in together once; he took Sarah out of the bed and brought her into the kitchen once; I told Ira they ought not to sleep together—it did not look well, and people might talk about it; the night Ira and Sarah were hurt, I asked him how he came to go down to Falls Field, and he said they took a walk down there, and fell off; he said they both fell off; I don't remember whether he said they both fell off together.

On her *cross-examination* by prisoner's counsel, she testified: I have seen Ira and Sarah in bed together only twice without the children; once was just after we moved to the Monroe street house, before the beds were put up, and we all slept on the floor in our room; the other time was once that Ira had sat up very late one night writing, and Sarah called to him to come get into bed with her, as Charles had not yet come home;

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the next morning Mr. Littles found them there; he came home between six and seven in the morning, and took Sarah up and brought her into the kitchen; when Ira got up he took Sarah back and went to bed with her; Ira got up immediately; Littles did not appear angry; I never heard him blame Ira for it; after Ira and Sarah got home that night, they didn't either of them say anything about Mr. Littles; that afternoon Ira and Sarah were in the middle room but a little while—a very few minutes; there was no fire in that room; there was a stove, but it was not put up; I was in the kitchen.

The witness then testified as to the relations between Mr. and Mrs. Littles during their married life, and it appeared that the cause of their difficulties was Littles' association with bad women, and leaving of his wife, and that he had twice had a venereal disease, the last time the last summer when the family resided on Andrews street, and that then Mrs. Littles watched over and tended him. She also testified that Mr. Littles was very jealous of his wife; that he was angry when other men walked with her, or rode with her, or paid her any attention; that he was particularly angry with a certain person with whom she sometimes walked and rode, and made threats against him. Also, that the last time Mr. Littles was at her house, was on the morning of the 19th of December. She also identified a quantity of clothing shown to her as being that of Ira and Mrs. Littles, which she had described as having been worn by them that night. This clothing was shown to the jury.

Charles Stout was then called and sworn for the prosecution. His testimony described his and his mother's going down to the Falls Field at Ira's and Mrs. Littles' request, and getting the cap and breastpin from under the cliff. It did not materially differ from that of Mrs. Margaret Stout, and corroborated it.

William C. Sorrs, sworn for the prosecution, testified: That burdock burrs were found on the clothes of Ira Stout and Mrs. Littles, which they had on the night of the homicide, and also that the chair arm found at Falls Field was one from Littles'

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office; he also described Galusha street as not a place where a dangerous fall could be had; also spoke of blood and burdocks on the clothes and in Mrs. Littles' hair; also, on cross-examination, spoke favorably of the character of deceased; that he saw him in the office about five o'clock of the afternoon of the homicide, &c.

The district attorney then called other witnesses, who described the scene of the homicide the morning of its discovery; but their testimony did not materially differ from that of John Quin.

Henry Hunter testified: That he was a lawyer; that Littles occupied the front room in his office; that Ira and Sarah used frequently to come to his office, until within about a month previous to the homicide, when they did not come so often; then about once a week, or once in two weeks; they came about tea time or a little after; Littles was there; had also seen them and others of the family in the streets together, at concerts, &c. This witness particularly described the place of the homicide.

Samuel M. Sherman was sworn for the prosecution, and testified: I went to the house, 75 Monroe street, the Sunday morning Mr. Littles' body was found; Ira lay in the bed; I asked him when he hurt his arm; he said night before last; I asked him where; he said on Galusha street; I understood him to say he was getting over a wall and fell about ten feet; I asked him if he knew Littles was killed; his reply was, perhaps he would not be found, or he thought he would not be found; I told him they had found him; he said nothing in reply to that; Bradshaw brought out his boots, which were wet; I asked him how his boots came wet; and he said he washed them every night; I saw his coat, cap and pantaloons; think there were burdock burrs on the brown coat, and spots of blood on one of the coats; I found in the bedroom a black basque; it was wet on one side; the pants looked as if they had been wet on the bottom and part way up; found a pair of lady's drawers on the bed; there was blood on them on the bottom; these things were all taken to the police office.

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William D. Oviatt, sworn, testified: Was chief of police in December last; went to the house on Monroe street, on Sunday, the 20th, in the forenoon; I told Ira he had got to go to the police office: he said there was no need of it; said he could not go without a carriage; I sent for a carriage and took him down; I asked him how he hurt himself; said he fell on Galusha street—fell about ten feet; I asked him if he had heard that Littles was found; he said he guessed it was not so; when I got to the police office I asked Ira to look at the corpse, and he said it was the body of Littles. This witness also testified about the burdock burrs on the clothing, and that he cut some from Mrs. Littles' hair.

Barnabus Wright, being sworn, testified: I reside in this city; I knew Mr. Littles well; recollect Saturday, December 19th; saw Littles last alive between seven and eight o'clock that evening, at the New England House, on Main street; he was there about ten minutes; I conversed with him about that length of time; when he came in he said he had been to the barber shop; the barber shop was the next room of the house; he looked as though he had just been shaved; he looked very well; when he went out he said he was going to the office.

William S. Mackey, sworn, testified: I keep a music and jewelry store on State street; I know Mrs. Littles; she called at my store a few days or a week before December 19th, and wanted to sell her watch; the watch was left to be sold; on the evening of December 19th, she came between six and seven o'clock and got the watch.

Mary Farrell was called and sworn for the prosecution, and testified: I reside at No. 66 State street; I know Mrs. Littles; have known her for two years; Mrs. Littles was at my place the same night that Littles was killed; she came about seven, and stayed until eight, or half-past eight. Witness then described her clothing. She did not do anything while she was there, but simply called in and stopped; she came and went alone.

On her *cross-examination* she testified: While there she went

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to the glass and smoothed her hair; she appeared quite cheerful; talked as usual.

Sarah Cunningham was called, sworn for the prosecution, and testified: I reside at 101 Main street; I know Mr. and Mrs. Littles; they boarded with me at one time; Mrs. Littles was at my house the Thursday night previous to the 19th of December; her husband was not there; she stayed there all night; on Friday morning her brother Ira came about eight, or half-past eight; he brought her a pair of rubbers; I couldn't say how long he stayed; I went out of the room and did not notice; Mrs. Littles had bought a new dress, and asked Ira to go in and see it; I went in too; my little daughter Georgiana was there; I left them in the parlor; I don't know when they left.

Georgiana Cunningham, was called and sworn as a witness for the prosecution, and testified: I was nine years old last February; I know Mrs. Littles and Ira Stout; I recollect hearing that Mr. Littles was killed; before that time Mrs. Littles was at our house; she stayed Thursday night all night; in the morning Ira came; I saw him in the parlor; I was sitting on the piano stool; I was playing the piano; I recollect Mrs. Littles showing a new dress; I don't know how long he stayed—think half an hour; before he went away he told her to go down on St. Paul street, and he would go around by the post office and meet her; Ira went out of the house first; I don't know how long after Mrs. Littles went; perhaps about a quarter of an hour afterwards.

Alonzo W. Hulse, called and sworn for the prosecution, testified: I have seen the prisoner, and know him by sight; I remember Saturday, the 19th of December; I saw him on the evening of that day on State street, just below the City Bank; he was going north; it was about half-past seven; no one was with him; I saw him distinctly.

The prosecution rested.

The defence, with a view to show that the homicide was not murder, but manslaughter, in addition to the facts already proved, introduced evidence tending to show the following facts:

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That a portion of the fractures on the skull might have been produced by a fall of the body of Littles over the precipice, and that a less number of blows were given upon Littles' head than would have been according to the opinion of the physicians who testified on the part of the prosecution; that soon after the marriage of Mr. and Mrs. Littles, difficulties arose between them on account of Littles' bad conduct towards her; that during the last summer Mr. Littles was sick with a venereal disease two or three weeks, and Mrs. Littles tended and nursed him during that time.

That Mr. Littles was very jealous of Mrs. Littles, and very angry when she had anything to do with any other man; that she, for some time past, extending through the past fall and up to the time of the homicide, had an intimacy with a certain man; that they used to meet clandestinely and walk together, and sometimes ride together; that Littles knew of it, and was very jealous of this man, and used to follow him and Mrs. Littles, and threatened him, and in one instance made preparations and threatened to shoot him; that Littles was very irritable and passionate when intoxicated, and was in the habit of drinking. Also, that the prisoner was a student in a commercial college in Rochester, and that he was on terms of friendship with Littles, and took his part in the family, and that he had repeatedly told Mrs. Littles that she ought to forgive her husband, and live with him again.

Also, that in the latter part of last fall Littles had purchased a house and lot in Rochester, and he and Mrs. Littles had an arrangement to go to keeping house in the next spring, if he behaved himself during the winter.

The evidence being closed, the court proceeded to charge the jury upon the law and facts of the case, and submitted the question to them, whether the prisoner was guilty of murder or manslaughter in the second degree.

The counsel for the prisoner requested the court to charge, among other things, as follows:

1st. In order to constitute a sufficient provocation for a homicide, to reduce it from murder to manslaughter, it is not

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necessary that there should be a mutual combat, with blows given and received on both sides.

2d. It is not necessary that a blow should be given by the deceased; it is sufficient that any trespass upon the person should be committed by him which would arouse sudden passion.

3d. When the facts and circumstances accompanying a homicide are given in evidence by the prosecution and defence, the question whether the crime be murder or manslaughter, is to be decided upon a review of all the evidence, as well that offered by the prosecution as that offered by the defence, and not upon any mere presumption arising from the mere fact of killing.

4th. That if there be any such presumption, it is a presumption of fact, and if the evidence lead to a reasonable doubt whether the presumption be well founded or not, that doubt will avail in favor of the prisoner.

5th. The burden of proof to maintain murder is always on the prosecution, and that burden of proof is not shifted by mere proof of the fact of killing. The prosecution must also prove, beyond a reasonable doubt, that the killing was with a premeditated design to produce death.

6th. If the jury have a reasonable doubt whether the homicide was manslaughter or murder, they are bound to give the prisoner the benefit of that doubt, and pronounce it manslaughter.

The court thereupon charged the jury as requested by the prisoner's counsel in the first, second, third, fourth and sixth of the foregoing propositions; and in regard to the fifth of said propositions, the court declined to charge as requested in that proposition, in respect to which the court instructed the jury that the burden of proof to maintain murder is always on the prosecution; that the rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown or appears in the case to show that the killing was not intentional, the presumption is that such killing was premeditated, and the burden of proof

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to show that the killing was not intentional is then upon the prisoner. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, whether adduced by the prosecution or evidence given by the prisoner. That it is in all cases incumbent upon the prosecution to prove, beyond a reasonable doubt, that the killing was with a premeditated design to produce death.

The counsel for the prisoner thereupon excepted to the decision of the court in declining to charge the jury as requested in the said fifth proposition, and also excepted to so much of the charge, in response to said request, as was at variance therewith.

The jury found the prisoner guilty of murder, and he was sentenced to be executed.

A writ of error was then allowed, and proceedings on the judgment stayed, to enable the prisoner to obtain a review in this court of the decisions in the court below.

John N. Pomeroy, for the plaintiff in error. (a)

I. The court erred in overruling the challenge for principal cause interposed by the prisoner to the juror, Johnson M. Tower.

(I.) A mere hypothetical opinion of a prisoner's guilt is not sufficient ground to sustain a principal challenge. (*Darrell v. Mosher*, 8 Johns. R., 445; *People v. Honeyman*, 3 Denio R., 121.)

1. An opinion of a juror based upon a hypothesis, does not involve the decision in his own mind of the question whether the reports or accounts of the prisoner's participation in the crime are true or false.

(a.) No apology can be necessary for reporting, more at length than usual, the points and briefs in this case. They cannot fail to be valuable to the profession, as containing a full reference to the authorities, and an able and philosophical discussion of the questions involved.

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2. Such an opinion leaves the juror's mind open upon the very question to be passed upon in trying the issue for which the jury are empaneled.

3. The law is therefore strictly logical and philosophical, in refusing to reject jurors who have formed mere hypothetical opinions of the prisoner's guilt.

(II.) The opinion of the juror Tower was not *hypothetical*, but was *fixed* and *absolute* in its character, and disqualified him from sitting on the trial as a juror.

1. A *fixed* or *absolute* opinion of a juror is one which involves a belief in the *facts upon which* it is formed. (1 *Burr's Trial*, 367, 371, *ed. of 1808*; *Neeley v. The People*, 13 *Illinois R.*, 685; *McGowan v. The State*, 9 *Yerger R.*, 184; *Moses v. The State*, 10 *Humph. R.*, 456; *Nelms v. The State*, 13 *Smed. & Marsh.*, 500; *Sam. v. The State, Id.*, 189; *Smith v. Eames*, 3 *Scammon R.*, 76; *Gardner v. The People, Id.*, 83.)

2. The terms *fixed* and *absolute*, are used entirely as correlative to the term *hypothetical*. They do not refer to the amount or strength of the opinion, but to its character and foundation. (See cases cited under the next subdivision.)

3. An opinion which involves a belief in the truth of the facts upon which it is founded, although weak, and capable of being removed, renders a juror entirely incompetent. The law will not cast upon the prisoner the burden of overcoming the effect of any such pre-occupation of the juror's mind against him. (1 *Burr's Trial*, 367, 371, *ed. of 1808*; *Id.*, 414 to 419; *People v. Mather*, 1 *Wend. R.*, 223, 241-5; *Ex parte Vermilyea*, 6 *Cowen R.*, 555; *People v. Vermilyea*, 7 *Id.*, 108; *Bodine's case*, 1 *Denio R.*, 281, 304, 5; *Honeyman's case*, 3 *Id.*, 121; *Freeman's case*, 4 *Id.*, 9, 34; *Cancemi's case*, 16 *N. Y. R.*, 2 *Smith*, 501.)

Many of the States have followed the rule adopted in this State, and their reports furnish examples of its application. (*Potter's case*, 18 *Conn. R.*, 166; *Benton's case*, 2 *Dev. & Bat. R.*, 196, 212, 217; *Cotton v. The State*, 31 *Miss. R.*; *Sam. v. The State, Id.*, 480; *Sam. v. The State*, 13 *Smed. & Marsh., Miss. R.*, 189; *Nelms v. The State, Id.*, 500; *McGowan v. The State*, 9

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Yerger R., 184; *Moses v. The State*, 10 *Humph. R.*, 456; *Arnstead v. Commonwealth*, 11 *Leigh. Va. R.*, 657; *Neeley v. The People*, 13 *Illinois R.*, 685; *Baxter v. The People*, 3 *Gilman R.*, 368; *Smith v. Eames*, 3 *Scammon R.*, 76; *Gardner v. The People, Id.*, 83.)

4. When a juror says that he has read or heard accounts of the transaction, and if they were true he had an opinion, and that he believed them true, such opinion is not hypothetical, but is fixed or absolute. (*Case of the juror Buckey*, 1 *Burr's Trial*, 367, 371; *Neeley v. The People*, 13 *Illinois R.*, 685; *McGowan v. The State*, 9 *Yerger R.*, 184; *Moses v. The State*, 10 *Humph. R.*, 456; *Nelms v. The State*, 13 *Smed. & Marsh.*, 500; *Sam. v. The State, Id.*, 189.)

5. If the statements of the juror are fairly susceptible of two constructions, one of which renders him competent, and the other incompetent, an appellate court will *in favorem vite*, put upon them that interpretation which disqualifies the juror.

This proposition is the *important* point decided by the Court of Appeals in Cancemi's case, although the learned reporter has not referred to it in his head note. (2 *Smith*, 504.)

The decision of the court below on a controverted question of fact arising upon the juror's testimony, does not conclude the appellate court.

The judge at Circuit Court, in Cancemi's case, had passed upon such a question of fact, and had decided the juror competent, the Court of Appeals distinctly conceding that two interpretations might fairly be put upon the evidence, one admitting and the other excluding the juror, as distinctly adopt the latter.

6. An analysis of the testimony of the juror Tower, shows that his opinion was fixed or absolute, and not hypothetical.

On his direct examination he discloses an opinion formed after reading accounts of the transaction, expressed by him and retained.

He "says he thinks" he has an opinion, but this language is only that of extreme caution, leading the witness openly to express what all witnesses, in testifying to such a fact, must

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necessarily imply. A person who speaks of the operations and state of his own mind, must necessarily think them to be as he expresses.

But the juror afterwards becomes absolute in his mode of expression and says plainly, "I formed an opinion," if, &c.

On his cross-examination he says he "formed an opinion if the accounts were true." This alone would show a hypothetical opinion merely. But he goes on and declares that he thought the accounts upon which this opinion was based were true, and that so far as he read he gave them credence.

What more could be said to indicate a disqualifying opinion? It is the case of a juror who has read accounts of the homicide, and believed them to be true, and upon such a basis forms an opinion of the prisoner's guilt, and is directly within the spirit and letter of the authorities cited.

But the juror goes further, and after disclosing an opinion founded upon such a basis, of the conviction of the truth of the alleged facts, says: "It might or it might not require evidence to remove my impression of the prisoner's guilt."

He does not say absolutely that it would not require evidence to remove his opinion, nor on the contrary that it would require such evidence.

But under the decision in *Cancemi's case*, there must be as much force at least given to the former as to the latter clause of this statement.

The juror then had such an opinion, based upon a belief in the truth of the statement upon which it was founded, as might require evidence to remove.

A man with a mind so pre-occupied, no matter how honest, the law pronounces unfit to try an issue of life or death.

Finally, in answer to a question from the court, the juror says: "I did not arrive at a definite opinion."

What does this mean? Did he intend to affirm that his opinion was not fixed or absolute, but hypothetical? He only gave a legal conclusion, which all the facts he had before testified to belie.

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The obvious meaning of this remark is, that he had no complete opinion upon the whole case; that he had not settled in his mind, *in a definite manner*, the entire details of the homicide; that he had not thus *defined* or marked out each particular; that his opinion was general, formed upon the general features or outlines of the case, rather than upon the minuter circumstances.

The peculiar phraseology shows that this was the idea in the juror's mind. *I have not arrived at* a definite opinion, implying that his mind had been and was in a condition of progress through the details of the case, and that as yet he had not settled them entirely, *definitely*.

It is submitted that the above is a fair analysis of the juror Tower's testimony, but that if it admit of any different construction, the court must adopt the one favorable to the prisoner.

(III.) The error was not obviated by the finding of the triers on the challenge to the favor. (*Cancemi's case, supra.*)

II. The court erred in admitting the evidence of Jane Stout and Margaret Stout, tending to establish an incestuous connection between the prisoner and his sister, Mrs. Littles.

(I.) It is a settled and fundamental principle of the common law, that on the trial of an indictment for one felony, evidence of other felonies committed by the prisoner cannot be given against him. (2 *Russ. on Crimes*, 694, *ed. of 1841*; *Wharton's Am. Cr. Law*, 238; *Roscoe's Cr. Ev.*, 80.)

1. In its administration of criminal jurisprudence, the civil law allows and requires such evidence. It investigates the antecedent character, disposition, habits, associates, business, in short the entire history of an accused person, to discover whether it is probable that he would commit the alleged crime. (*Feuerbach Remarkable Trials, preface.*)

2. English and American criminal law, in its practical administration, confines itself to the investigation of the very crime charged, and restricts judicial evidence to circumstances directly connected with and necessary to elucidate the issue to be tried.

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3. These two systems are diametrically opposed to each other, and whatever may be said of their comparative merits, the rule of the common law is so firmly established that it lies at the very foundation of criminal procedure, as an inseparable element of the trial by jury.

4. Trained judicial minds may be able to eliminate from a mass of irrelevant and general criminative facts, those which directly bear upon the crime charged against the prisoner, but the very character of juries, and the theory of trial by jury, require that all prejudicial evidence tending to raise in their minds an antipathy to the prisoner, and which does not directly tend to prove the simple issue, should be carefully excluded from them.

(II.) While the general rule is thus embodied in the common law, as a part of its very foundation, there are certain exceptions, which have been introduced from *absolute necessity*, to aid in the detection and punishment of crime.

These exceptions are few in number, and have thus far been carefully guarded and limited by the courts.

They have all been allowed *as exceptions* from the *very necessity of the case*, while the general rule has, at the same time, been retained and enforced. (*See cases cited under the following subdivisions.*)

These exceptions are all embraced in the following classes:

1. Evidence of another felony than that charged may be admitted to prove identity.

(a.) Identity of the instrument used in committing a crime. (*Rex v. Fursey*, 6 Car & Pa., 81; 25 Eng. Com. L. R., 293.)

(b.) Identity of the persons engaged in committing a crime. (*Rex v. Westwood*, 4 Car. & P., 547; 19 Eng. Com. L. R., 520; *Rex v. Rooney*, 7 ib., 517; 32 ib., 608; *Osborne v. The People*, 2 Park. Cr. R., 583.)

2. When a guilty knowledge or intent is necessary to be directly shown, other felonies done by the prisoner may be given in evidence. But these must be either acts of the same kind as the one charged, done by the prisoner upon others about the time of the alleged offence, or prior attempts to com-

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mit the same offence, or prior commissions of the same offence upon the injured party.

(1.) To prove guilty knowledge. This class of cases is almost entirely confined to the crime of uttering forged notes or coin. (*Rex v. Smith*, 2 Car. & P., 638; 12 Eng. Com. L. R., 295; *Rex v. Balls*, 7 Id., 429; 82 Id., 571; *People v. Hopson*, 1 Denio R., 574; *People v. Tharp*, 15 Ala. R., 749, 756; *Peck v. The State*, 2 Humph. R., 78.)

(2.) To prove *guilty intent*, where the defence set up is that the act charged was done accidentally or innocently.

The intent referred to in this subdivision is not a *general* criminal intent, but the *particular intent*, as a matter of fact, with which the act was done.

This remark is necessary to limit the inaccurate general expressions of some text books, and judicial dicta. (*Rex v. Mogg*, 4 Car. & P., 364; 19 Eng. Com. L. R., 420; *Rex v. Winkworth*, Id., 444; Id., 465; *Rex v. Dossett*, 7 Id., 318; 61 Id., 304; *Rex v. Donall*, Id.; Id., 306, n.; *Rex v. Farrell*, Id.; Id., 308, n.; *Edgerton's case*, Russ. & Ry. C. C., 375; *Voke's case*, Id., 531; *Williams v. The State*, 8 Humph. R., 585; *Walker v. The Commonwealth*, 1 Leigh. [Va.] R., 574; *Wills on Circumstantial Evidence*, 33, 44 marg. pag.; *Burrill on Circumstantial Evidence*, 284.)

3. When the several felonies are so connected together as to form parts of the same transaction, so that a complete account of the one on trial cannot be given without introducing evidence of the others. (*Rex v. Ellis*, 6 Barn. & Cress., 139; 13 Eng. Com. L. R., 123; *Rex v. Birdseye*, 4 C. & P., 386; 19 Id., 433; *Rex v. Salisbury*, 5 Id., 155; 24 Id., 253; *Rex v. Long*, 6 Id., 179; 25 Id., 343; *Reese v. The State*, 7 Georg. R., 373; *Walker v. The People*, 1 Leigh [Va.] R., 574; *Voke's case*, Russ. & Ry. C. C., 531; *Rex v. Wylie*, per Lord Ellenborough, 1 New Rep., 4 B. & P., 92; *People v. Wood, Livingston Oyer and Terminer*, 1858. *Johnson, J., opinion on motion for a writ of error*.) (a.)

4. Evidence of a distinct felony committed by the prisoner at a different time, and on a different person, may be intro-

(a.) 3 Park. C. R., 681.

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duced, when proof has been given showing some connection between the transactions, and raising a presumption that the latter grew out of and was caused by the former. (*Rex v. Clewes*, 4 Car. & P., 221; 19 Eng. Com. L. R., 354; *Johnson v. The State*, 17 Ala. R., 618, 625; *Dunn v. The State*, 2 Ark. [Pike] R., 229; *Walker v. The State*, 1 Leigh [Va.] R., 514; *Stone v. The State*, 4 Humph. R., 27; *Kinchelow v. The State*, 5 Id., 9; *Per Johnson, J., in Wood's case, supra.*)

The last two subdivisions in fact fall under the same general exception, for no case can be found in which the different felonies did not form acts of the same drama in carrying out the original criminal intent of the accused party.

The rule stated in the last exception is a nearer approach to the civil law doctrine than any of the other classes, and is in spirit quite opposed to the theory of the common law, and it should not at least be extended beyond the decided cases unless required by imperative necessity.

(III.) This case does not in any of its circumstances fall within the exceptions to the general rule.

1. It is plainly not included within either of the first three classes of exceptions. There is no question of identity, nor does the evidence tend to show a guilty knowledge or intent, nor were the incest and homicide parts of the same transaction. (*See cases under the 1st, 2d and 3d classes of exceptions.*)

2. Nor is the evidence embraced within the fourth class. No adjudged case in the least resembles the one at bar in the facts, nor is the reason of the rule applicable to it, so as to require the evidence in order to secure the detection of crime.

It will be claimed now, as it was on the trial, that the evidence of incest was admissible upon the question of motive.

(1.) In all capital cases, and especially in those where the evidence is entirely circumstantial, it is eminently proper, though not indispensable, for the prosecution to show some motive for the commission of crime. (*Best on Presumption*, 309; *Wills on Circumstantial Evidence*, 28 to 34, Am. ed., 37 to 45, marg. pag; 1 *Starkie on Evidence*, 491; *Burrill on Circumstantial Evidence*, 281 to 328.)

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It is so contrary to *ordinary* human experience for murder to be committed, that it is difficult to conceive of its perpetration, unless the criminal were impelled thereto by some strong mental influences which to him seemed controlling.

(2.) Evidence to show a motive is applicable to the issue, whether the accused be guilty of the alleged crime of murder, and not to any independent or subordinate issue. (*Burrill on Circumstantial Evidence*, 296, 7.)

a. There is no separate and minor issue of whether the accused had a motive to commit the crime.

b. The single issue for the prosecution to maintain, in trials for murder, is, *did the prisoner intentionally kill the deceased?*

c. Upon this simple and single issue, and applicable to the fact of premeditation, proof of motive is competent and important, and goes directly to the question of the guilt of the prisoner.

d. All legitimate evidence of motive, therefore, must have a tendency to show the accused guilty of premeditation in the homicide.

(3.) The evidence to substantiate a motive to commit the crime alleged, must be such as to show, not a general antecedent probability of the prisoner's committing crime generally, or that crime in particular, but such as to show a *direct tendency and impulse in his mind to commit that very crime, on the very person.*

a. It is true that the range of inquiry in showing motive, must, from the nature of the subject, be very broad. (*Hendrickson v. The People*, 6 Seld. R.; *Wills on Cir. Ev., supra*; *Burrill on Cir. Ev., supra.*)

b. But not broader than the nature of the subject demands. The field cannot be open to the *guesses* of the jury.

c. There must be an *apparent and necessary connection* between the evidence offered, and the motive which it claims to substantiate. (*Per Johnson, J., in Wood's case, supra.*)

b. And that motive must be *particular and direct in its application*, to the crime for which the prisoner is charged.

(4.) When the evidence offered to show motive consists of proof of another and distinct felony, it can only be received

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under the limitations and in the instance stated in the fourth class of exceptions before given. (*See cases cited under the fourth class. Supra.*)

(5.) The evidence in question tended to prove a felonious incestuous connection between the prisoner and his sister, and did not tend to show any motive in his mind for the murder of the deceased.

A. Assuming the theory upon which the trial was conducted, as given in the preceding statement of facts, and upon the motive therein imputed to the prisoner, the evidence of incest was incompetent.

a. There was no evidence in the case showing, or tending to show, any connection between the incest and the murder. (*Dunn v. The People. Supra.*)

b. Nor to raise a presumption that the murder grew out of, or was in any way referable to the incest. (*Dunn v. The People, supra; Rex v. Clewes, supra; Walker v. The Commonwealth, supra.*)

c. Nor do the necessary laws of human conduct and experience point to the murder as in the least resulting from the former felony.

d. The evidence shows a wicked intimacy between the prisoner and his sister, and raises a general presumption from his depraved moral character, that being guilty of incest, he would not falter at murder; but such presumptions are entirely rejected by our criminal law. (1 *Leigh [Va.] R., Walker's case.*)

e. This felony shows an intimacy of the *same kind* between the prisoner and his sister, as would have been shown by proof that they had together committed a murder, an arson, a robbery, or any other heinous crimes, and beyond all question, evidence that they had been jointly engaged in such other felonies, would not be received to show the motive.

B. On the argument of this writ of error, the People may adopt another hypothesis, and impute a different motive to the prisoner. It may be urged that these guilty parties, being detected in their incest by the husband, took his life solely for the purpose of preventing him from exposing or punishing the

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crime, or for the purpose of allowing them the more free indulgence in their wicked propensities.

If this view of the case is now urged, I say:

a. The trial did not proceed upon any such hypothesis, as is palpable from the bill of exceptions, which contains the substance of all the testimony. (See especially the testimony of Jane Stout and Margaret Stout, in full.)

b. Upon this theory there were no facts or circumstances proved connecting the incest with the murder, and raising the presumption that the latter was caused by the former. (*See cases cited under the 4th class of exceptions.*)

c. The cases of *Rex v. Clewes*, *People v. Dunn*, and *People v. Wood*, are the only ones which can be found, in which evidence of a prior distinct felony upon another person has been admitted upon such a theory to show motive, and in each of these cases *there was direct and distinct evidence given for the express purpose of connecting the two felonies.*

d. The prosecution showed affirmatively that the deceased did not complain or interfere with, and was not angry at these acts of the parties.

e. This hypothesis is an after-thought, and the People are not warranted in adopting it to sustain the evidence which was admitted upon an entirely different theory.

(IV.) This evidence was eminently calculated to blacken the moral character of the prisoner, to show him depraved and lost to all sense of decency, and to weigh most powerfully against him with the minds of a jury, not trained by legal studies to abstract from their consideration all facts not directly relevant to the issue. (*Thurston v. The People*, 2 *Parker's Cr. R.*, 49, 180.)

III. This court cannot consider or weigh the question whether the prisoner be guilty of the crime charged. If errors have been committed, the judgment must be reversed, and a new trial awarded.

The result of this case, in its bearing upon the prisoner, is insignificant compared with its importance in correctly determining the law.

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"However clear the proof of the prisoner's guilt in this case may be, it is better that the people should be put to the trouble of establishing it upon a second trial, than that the force of a salutary rule, upon which life may often depend, should be impaired." (*Per Selden, J.*, 15 *N. Y. Rep.*, 397.)

C. Huson Jr. (District Attorney), for the People.

I. The challenge to the juror, Tower, was properly overruled. As a question of law, and as a matter of fact, he had formed no such opinion as disqualified. (*The People v. Freeman*, 4 *Denio*, 9; *The People v. Honeyman*, 3 *Denio*, 121; *The People v. Bodine*, 1 *Denio*, 281; *Blake v. Mellspaugh*, 1 *Johns.*, 316; *Durrell v. Mosher*, 8 *Johns.*, 347; *Pringle v. Huse*, 1 *Cowen*, 432, note; *The People v. Vermilyea*, 6 *Cowen*, 555; *Id.*, 7 *Cowen*, 108; *The People v. Mather*, 4 *Wend.*, 229; *The People v. Cancemi*, 16 *N. Y.*, 501; *Am. Crim. Law*, 945, *et seq.*; 1 *Burr's Trial*, 413-420; *The State v. Potter*, 18 *Conn.*, 166; *Com. v. Spruce*, 2 *Virg. Cas.*, 375; *The State v. Benton*, 2 *Dev. and Bat.*, 196; *The State v. Ellington*, 7 *Iredell*, 61; *Bacon's Abr. Juries, Et.*; *Com. v. Ostrander*, 5 *Leigh*, 780; *Com. v. Moran*, 9 *Leigh*, 651; *Com. v. Epes*, 5 *Grattan*, 676; *Com. v. Smith*, 6 *Grattan*, 696; *Id.*, 7 *Grattan*, 593; *Com. v. Clore*, 8 *Grattan*, 606; *Com. v. Wormsley*, 10 *Grattan*, 658.

From the above cases we conclude:

1. It is a ground of challenge for principal cause, that a juror has formed and expressed an opinion touching the guilt of the prisoner. (*And see American Cases, passim.*)

2. But such opinion must be "definite," "determinate," "fixed," "settled," "unconditional," "absolute." — And not merely "hypothetical," "conditional," "contingent," "indeterminate," "floating," &c. (4 *Denio*, 9, 34; 3 *Id.*, 121, 123; 4 *Wend.*, 229, 243; 8 *Johns.*, 347; 7 *Iredell*, 61, 62; 18 *Conn.*, 166.)

3. A challenge for cause must be disposed of, either on demurrer or by traverse. In the former case it is purely a question of law; in the latter it is almost always a question of fact.

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4. Formerly, as it is sometimes the case now, triers found the questions of fact the same as on challenge for favor. Now, they are generally found by the court. But whether found by the court or by triers, so far as they are *questions of fact*, they cannot be reviewed by an appellate court. For the last three propositions, see 4 *Denio*, 31-34; 6 *Cowen*, 555; 4 *Wend.*, 227, *et seq.*; 2 *Dev. and Bat.*, 215-218; 7 *Iredell*, 61-63.

5. Most of the confusion and the conflicting *dicta* on the subject of challenges, in our reports, have arisen from a failure on the part of some judges to distinguish between questions of *law* and matters of *fact*. Appeal judges have assumed to overrule Oyer and Terminer judges sitting as triers.

6. It is incumbent on the challenging party to prove the *truth* of his challenge. (2 *Virg. Cas.*, 375.)

7. In the case at bar, the juror swore he had no definite opinion; the judges sitting as triers found that he had no opinion whatever importing bias—and who shall say he had?

8. Compare the testimony of the juror in this case with that of the juror (see for testimony trial of *Freeman*, 165, in the case 4 *Denio*, 9-15, 34, 35; and in 7 *Iredell*, 61, 62; as also in the other cases above quoted.)

II. Evidence that the defendant and Mrs. Littles slept together was properly received. It tended powerfully to prove motive; and that it tended to prove another felony, makes no difference. (*Roscoe's Cr. Ev.*, 81, *et seq.*; *Bur. Civ. Ev.*, 290, 291; 2 *Cow. and H. Notes*, 462, *et seq.*; *Am. Cr. L.*, 3d ed., 292, *et seq.*; *Russ. on Cr.*, 694; 1 *Starkie's Ev.*, 491; 1 *Greenl.*, § 53; *Cary et al. v. Hotailing et al.*, 1 *Hill*, 311; *Olmstead et al. v. same, Id.*, 317; *The same v. Watkins*, 9 *Conn.*, 47; *Rex v. Clewes*, 4 *Car. & P.*, 221-444; 19 *Eng. Com. L.*, 354; *Com. v. Heath*, 1 *Robinson*, 735; *The State v. Rash*, 12 *Iredell*, 382; *The State v. Stone*, 4 *Humph.*, 27; *The State v. Williams*, 8 *Id.*, 585; *The State v. Baker*, 4 *Ark.*, 56; *The State v. Baalam*, 17 *Alabama*, 451; *The State v. Martin et al.*, 28 *Id.*, 71; *The State v. Bob*, 29 *Id.*, 20; *The People v. Wood*, *per Johnson, J.*; *The People v. Rathbun*, 21 *Wend.*, 509; *The People v. Hopson*, 1 *Denio*, 574.)

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1. It is a general rule that evidence must be confined to the issue.

2. Motive is a *fact* which may be proved like any other fact in the case.

3. Whatever fact fairly tends to prove the assumed motive, is competent, though that fact be the subject of a distinct felony. (1 *Park. Cr. R.*, 649-655; *Id.*, 495-539; *Am. Cr. L.*, 292, *et seq.*; *Roscoe Cr. Ev.*, 81, *et seq.*; 19 *Eng. Com. L.*, 354; and see other cases cited above; 1 *Leading Cr. Cas.*, 189, and cases cited in note.)

4. Whenever guilty knowledge is required to be shown, every fact tending to show it is admissible, although it proves a distinct and separate felony. (*See all the cases.*)

5. The same is true when intention is an ingredient of the crime charged.

6. It is no objection to a fact, otherwise competent, that it tends to prove, or does prove, a distinct felony.

MURDER.—Proof of a previous murder competent to show motive for the one charged. (4 *Car. & P.*, 221; 19 *Eng. Com. Law*, 354; 1 *Robinson*, 735; 2 *Ark.*, 229; 243 *et seq.*)

INCEST.—Former attempts admissible to show the *quo animo* of the attempt charged. (8 *Humph.*, 585-593.)

MALICIOUS SHOOTING.—Same as above. (*Russ. & Ry.*, 581.)

ADULTERY.—On trial for murdering his wife, it was proved that defendant committed adultery with Mrs. B. (In Connecticut this was a crime.) (9 *Conn.*, 47-51; 1 *Leading Cr. Cas.*, 201, *note.*)

FRAUD.—Previous acts of fraud competent on trial for the fraud charged. (1 *Hill*, 311, 316.)

CRIMINAL ILL-TREATMENT.—On trial for murder, former criminal conduct competent. (12 *Iredell*, 382; 4 *Humph.*, 27, 36.)

ARSON.—Previous attempt to induce another person to burn the house, admissible. So also may prove a larceny. (28 *Alabama*, 71; *Rickman's Case*, 2 *East. P. C.*, c. 21.)

ASSAULT WITH INTENT TO KILL.—A blow aimed at one person kills another. Evidence of former attempts on the first person admitted. (29 *Alabama*, 20.)

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LARCENY.—One larceny may be proved on trial for another. (13 *Eng. Com. Law*, 145.)

FORGERY.—One forgery may be proved on trial for another to show *scienter*. (*Am. Cr. Law*, 292–300, and all the cases.)

BURGLARY.—On trial for burglary, larceny may be proved; or forgery, as where the burglary was committed to procure forged paper, or to destroy evidence of it, or generally any felony which may have furnished a motive to the crime charged. (*Burr. Cir. Ev.*, 290, *et seq.*)

7. In this case the defendant, Stout, was brother of his co-defendant, Mrs. Littles, and brother-in-law of Mr. Littles, the deceased. Evidence of an adulterous connection was competent to rebut the *natural* presumption growing out of the relation of defendant and deceased. (9 *Conn.*, 47; 17 *Alabama*, 451.)

8. It is in proof that Mr. Littles knew that defendant slept with his wife; that he took Sarah out of the bed, &c. If this conduct was incestuous, had not defendant a powerful motive to get rid of the evidence of it? (4 *Car. & P.*, 221.)

9. Evidence is competent, under the head of motive, which the court can see might possibly influence the conduct of the prisoner.

WELLES, J. The counsel for the plaintiff in error contends that the judgment should be reversed upon two grounds, which I shall proceed to state and consider.

I. On the trial, in the course of impanneling the petit jury, Johnson M. Tower was drawn and called as a juror, and appeared. He was challenged by the prisoner's counsel for principal cause, on the ground that he had formed and expressed an opinion touching the prisoner's guilt, and the district attorney traversed the challenge. The juror being sworn and examined as a witness on behalf of the prisoner in support of the challenge, testified as follows: I have read part of the accounts of the transaction in the newspapers; I think I have an impression as to the defendant's guilt or innocence; I rather think I have formed an opinion; I presume I have expressed it; I think I retain it. On his cross-examination he testified;

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I formed an opinion if the accounts were true; I rather thought they were true; so far as I read I gave them credence. On his re-direct examination he testified: I rather think I believed the accounts true; it might or might not require evidence to remove my impression of the defendant's guilt. In answer to a question by the court, the juror testified: I did not arrive at a definite opinion. The court thereupon overruled the challenge, and the prisoner excepted. The juror was then challenged for favor, and after evidence given to the triers, they, on hearing arguments of counsel, and being charged by the court, found the juror indifferent, and he was sworn as a juror, and sat as such during the trial. The decision of the court below, in overruling the challenge to the juror Tower, for principal cause, as above stated, constitutes the first ground of error as now urged by the counsel for the plaintiff in error.

We should not lose sight of the fact that the question is upon the principal challenge for cause, to wit: that the juror had formed and expressed an opinion, &c. That was the cause or matter of fact alleged as the ground of objection to his competency. If the allegation that he had formed and expressed an opinion touching the prisoner's guilt, was true, then, as matter of law, the juror was incompetent. But the fact alleged was traversed, and its existence put in issue. It was therefore incumbent upon the prisoner to prove its truth. He held the affirmative in this issue, and was bound to sustain it by evidence. *Prima facie* the juror was competent, and must now be so regarded, unless by a fair construction of the evidence given in support of the challenge, we can see that the court below committed an error in overruling it. That court did not believe that the alleged fact was proved. Their conclusion of fact upon the evidence, was, that the juror had not formed or expressed an opinion. The question before this court is, whether their conclusion was correct or erroneous.

Challenges to the jury are of two sorts: First, to the array, and second to the polls. The latter is subdivided into, first, challenges for principal cause; second, challenges for favor; and third, in certain cases and to a limited extent, peremptory

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challenges—the last of which requires no cause to be alleged or proved to sustain it. All others are to be regularly tried by the court, except the challenge for favor, which is to be determined by *triers*. In all of them, except peremptory challenges, the matter of fact upon which the challenge is founded must be specified when the challenge is interposed, or the court should disregard it. In every case of challenge for cause, whether to the array or to the polls, the other party, and in criminal cases, if the challenge be by the prisoner, the public prosecutor, may traverse the facts alleged as the ground of the challenge, or he may demur, by which he admits the truth of the allegation.

A challenge to the poll for principal cause, to be effectual, must be on account of some matter of fact, which, if admitted or proved, necessarily and conclusively disqualifies the juror. Among the causes for such challenge, is the one assigned against the juror in the present case—that he had formed and expressed an opinion in relation to the prisoner's guilt. When that is established, the law declares, and it is the duty of the court, to pronounce him incompetent. In such a case the law implies a bias in the mind of the juror which disqualifies him.

In this connection it is important to understand what is meant by an opinion, which operates thus conclusively to disqualify a person as a juror. We say it is an opinion which is absolute, unconditional, definite and settled; in distinction from one which is hypothetical, conditional, indefinite and uncertain. The mind must be, for the time being, settled and at rest upon the question of the prisoner's guilt, or upon the question to be tried. Nothing short of this will, *per se*, render the juror incompetent in law upon a challenge for principal cause, founded upon an allegation that he has formed an opinion. This is the good sense of the rule, and according to the current of authorities. (*Freeman v. The People*, 4 Denio, 1; *The People v. Bodine*, 3 Id., 281; *The People v. Honeyman*, Id., 121; *Durrell v. Mosher*, 8 Johns. R., 347.)

Upon a challenge for favor to be determined by triers, the rule is different, although the objection rests upon the same

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foundation in both cases—that of bias in the mind of the juror. In the one case the law implies such bias from the fact alleged and admitted or proved, and in the other, the triers may be justified in finding its existence from the evidence presented to them, tending to show that the juror does not stand indifferent, although there be no direct evidence proving that he has formed or expressed such an opinion as necessarily constitutes a legal disqualification.

We will now examine whether, in the light of the foregoing rules, the challenge in question was sustained by the evidence given in support of it. Had the juror formed or expressed an opinion touching the guilt of the prisoner which was absolute, unconditional, definite and certain?

1st. The evidence does not prove that he had formed an opinion. On this question the juror testified that *he thought he had an impression*; he rather thought he had formed an opinion; he presumed he had expressed it, and thought he retained it; that he had formed an opinion, if the newspaper accounts of the transaction (of which he had read only a part), were true; that he rather thought they were true, and that, so far as he read, he gave them credence. This does not prove the existence of an opinion in the mind of the juror. An opinion, in this sense, implies a settled judgment or conviction of the mind. If that was the condition of the juror, he certainly knew it.

2d. Whatever else may have been the juror's mental state, it cannot be said that he had an absolute and unconditional opinion in relation to the guilt of the prisoner. If he had any opinion on the subject, it was founded upon the hypothesis that the newspaper accounts were true. Of those accounts he had read only a part, and he rather thought they were true. He does not say he believed them true, but his expression implies hesitation of mind and doubt on the subject.

3d. The opinion, if such it can be called, of the juror, was indefinite and uncertain. He expressly states, in the conclusion of his evidence, that he did not arrive at a definite opinion. He had previously testified that he *thought* he had an *impression* as to the defendant's guilt or innocence. It cannot be useful

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to multiply words on a proposition so simple and plain. The substance of the evidence on this point is, that the juror *thought* he had an *impression*, which his own account of it shows was uncertain, indefinite and incomplete.

Upon the argument it was urged by the prisoner's counsel, that the evidence in support of the challenge in question brought the case substantially within the rule of exclusion adopted in the case of *Cancemi v. The People*, lately decided by the Court of Appeals. (16 *N. Y. R.*, 501.) In my judgment, however, the cases are plainly distinguishable. On the trial of *Cancemi*, Alexander Kyle was called as a petit juror, and being challenged for principal cause, testified that he had formed an opinion and expressed it. On cross-examination, he said that he had no fixed opinion—none which could not be removed by evidence. The challenge was overruled; and the defendant excepted. The prisoner was convicted of murder, and judgment of death pronounced upon him. The judgment was reversed in the Court of Appeals on this exception.

The fact, as disclosed by the evidence of the juror, was that he had formed an opinion, which was so fixed as to require evidence to remove it, and that he had expressed such opinion. The qualification of the opinion, in his cross-examination—that he had no fixed opinion—is itself qualified by what immediately follows, viz.: that he had no opinion which could not be removed by evidence. • Taking it altogether, the plain and simple construction of his evidence is this: that he had formed and expressed an opinion touching the guilt of the prisoner; but that such opinion was not so firm as to be beyond the power of evidence to remove it. Or, that it was so fixed, that it would remain until displaced or overcome by evidence. The case, as thus presented, was obviously within the rule of exclusion of the juror. There was no doubt of the fact that the juror had formed and expressed an opinion. He had so testified, unequivocally. The opinion he had formed was absolute, unconditional, definite and certain. There was nothing to show it to have been hypothetical or conditional, uncertain, indefinite, or incomplete. In these respects, it forms

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an entire contrast to the case at bar. This will be more apparent by placing the substance of the evidence given in support of the challenges in the two cases, respectively, in juxtaposition. In *Cancemi's* case, the evidence was that the juror had formed and expressed an opinion touching the guilt of the prisoner, which would remain until displaced by evidence. In the present case it was, that the juror had read part of the accounts of the transaction in the newspapers; that he thought he had an impression as to the defendant's guilt or innocence; that he rather thought he had formed an opinion, if the accounts were true; that he rather thought the accounts were true; that, so far as he had read, he gave them credence; that he presumed he had expressed an opinion, and thought he retained it; that it might or might not require evidence to remove his impression of the defendant's guilt; and finally, that he had not arrived at a definite opinion.

We think the exception to the decision of the court below, in overruling the challenge in question, was not well taken.

II. On the trial the following facts, in substance, were proved: The dead body of Charles W. Littles was found on the morning of the 20th of December, 1857, in the Genesee river, below the falls, in Rochester. From the appearance of the body and of the ground at the top of the bank and on the side of the slope, it was evident that the deceased came to his death by violence. He had been last seen the night before, between seven and eight o'clock. Much evidence was given, tending strongly to show that the prisoner and Sarah Littles, who was his sister and the wife of the deceased, were present at the homicide. They were at their mother's house the night before at tea. Mrs. Littles left the house about half-past six o'clock, and the prisoner about seven, in the evening, and were met near the house of their mother returning together, about ten o'clock, and were found by their mother together in a room in her house about eleven o'clock; each had a broken arm, bruises on their persons, and spots of blood on their garments. In the night a physician was sent for, who set the prisoner's arm. Attempts were made the same night to remove the blood spots, and

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to conceal other evidences of crime. On the same night they sent their mother and a younger brother to the point below the falls, near where the body of Littles was found the next morning, to get the prisoner's cap and Mrs. Littles' breastpin, saying that they had been walking down on the Falls Field, and had fallen over the bank. The cap and pin were found and brought home. A pair of side-combs, a rosette for the hair, and the tag of a victorine, were found on the spot the next morning, which appeared to belong to Mrs. Littles.

The theory of the prosecution, as stated to the jury, and as drawn from the evidence, was, that difficulties had existed for a long time between Mrs. Littles and her husband; that she had partially separated from him, and that they had not lived together as husband and wife since the month of June, 1857; that the prisoner, having been absent from home for five or six years, returned in August, 1857, and that being informed of the difficulties between his sister and the deceased, entered into and espoused her cause; that Mrs. Littles had, that fall, intended to leave Rochester and go west, and had left her watch with one Mackie, a jeweler, for sale, in order to raise money; but that the prisoner and she at last adopted a plan by which the deceased was to be decoyed to the Falls Fields by Mrs. Littles, under the pretence of an assignation on her part with another man, and that while there, the prisoner, who was to go with Littles, would commit the homicide.

Evidence was given by the prosecution, showing a state of difficulty between Mrs. Littles and the deceased, that they had quarrelled and partially separated; that since the month of June, 1857, they had not lived together as husband and wife, but during the fall of that year, and especially in the months of November and December, the deceased spent a large part of his time at the house of his wife's mother, where she lived, and eat and slept there with his wife frequently; that the deceased was very jealous of his wife; that the prisoner having been absent from home five or six years, returned in August, 1857, and was informed of the difficulties between Mrs. Littles and the deceased; also, that Mrs. Littles, the past fall, had left

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her watch at Mackie's shop to be sold, and that on the night of the homicide, and before it, she took the watch away from the shop. In June, 1857, Mrs. Littles applied to an attorney to procure a divorce from her husband, but the attorney advised against the application.

At this stage of the proof, evidence was offered by the prosecution having a tendency to show an incestuous connection between the prisoner and his sister, Mrs. Littles, during the fall of 1857. The evidence was objected to by the prisoner's counsel, and received by the court on the question of motive, and the prisoner's counsel excepted. No evidence was offered tending to connect this with the homicide, other than as might be inferred from the fact of the homicide occurring subsequent to the assumed incest; and no other evidence was offered on the subject, except that it appeared that the deceased saw at least one of the acts of sleeping together by the parties, and that he exhibited no anger on the occasion, and it did not appear that he made any objection thereto.

The decision of the Oyer and Terminer, in overruling the objection to this evidence, constitutes the remaining ground of error, as now urged in behalf of the prisoner.

It is a general rule of the common law, applicable to the trial of issues, both in civil and criminal cases, that the evidence shall be confined to the question in issue. This rule should be strictly observed in criminal cases. (2 *Russ. on Crimes*, 772; *Rosc. Cr. Ev.*, 81; 1 *Phill. Ev., Cow. & Hill's ed.*, 169, 178.) Hence, on a trial for felony, the prosecution will not generally be permitted to give evidence tending to prove the defendant guilty of another distinct and independent felony. The only effect of such evidence, unless it went to establish some fact essential to make out the crime charged, such as a motive, *scienter* or identity, and so connected with it as to be a part of the *res gesta*, would be to prejudice the defendant with the jury, without thereby advancing a particle in the proof of the felony for which the defendant stands indicted. But where the evidence tends to establish any essential ingredient of the crime charged, the fact that it proves or tends to prove another

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felony not charged in the indictment, is not a reason why it should be excluded. It is no objection to evidence of a fact, otherwise competent, that it proves or tends to prove a distinct felony. The evidence in this case, tending to show that the prisoner had been guilty of the crime of incest with his sister, Mrs. Littles, was, in my judgment, entirely competent. It went strongly to establish a motive on the part of both of them to get the deceased out of the way. While he lived, they were at his mercy. He was more interested than any one else to prosecute them for the crime. He was and had been for months on bad terms with his wife, and the inference from the evidence is strong that the prisoner sympathized with her, entered into her feelings, and espoused her quarrel with her husband. In case he was effectually disposed of and silenced, their fears of exposure and detection would naturally be lessened, and their sense of safety and impunity increased.

The *corpus delicti* had been proved, and the principal question for the jury to determine, was, whether the prisoner was the perpetrator of, or implicated in, the crime. The evidence on that question, though circumstantial, was strong and convincing that he was the murderer. If anything was wanting, it was a motive on his part. That motive was supplied, in connection with other facts proved, by the evidence, the admission of which was the foundation of the exception under consideration. The only objection urged against its admission, is, that its tendency was to prove the prisoner guilty of another and distinct felony. That the objection is not well founded, is to my mind clear, not only from the reason and good sense of the case, but upon authority. The cases of *Rex v. Clewes* (4 Car. & Paine, 221; found also in 19 Eng. Com. L. R., 354), and *The State v. Watkins* (9 Conn. R., 47), as well as others which might be referred to, establish clearly, as I think, that the evidence in question was properly admitted.

I am accordingly of opinion that the judgment of the court below should be affirmed.

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E. DARWIN SMITH, J. Two questions are presented upon the writ of error in this case, for our examination and decision. The first relates to the decision of the Oyer and Terminer overruling the challenge of the prisoner to the juror Johnson M. Tower, and the second to the admissibility of the evidence allowed on the trial, showing an incestuous intimacy between the defendant and Mrs. Littles, the wife of the deceased.

First. The question in respect to the competency of the said Johnson M. Tower to serve as a juror, arises upon an exception to the decision of the court, overruling the challenge of the defendant for principal cause. It appears, from the bill of exceptions, that during the proceeding to impanel a jury for the trial of the prisoner, the said Johnson M. Tower was "drawn and called as a juror, and was thereupon challenged by the prisoner for principal cause, on the ground that he had formed and expressed an opinion touching the guilt of the prisoner, and the district attorney traversed the challenge."

By traversing the challenge, the district attorney admitted its validity as matter of law, but denied its truth. (*The People v. Freeman*, 4 Denio, 88.) An issue of fact was thereby formed for trial, and which the prisoner was bound to sustain by evidence.

If the district attorney had demurred to the challenge, he would have admitted that this juror had in fact formed and expressed an opinion touching the guilt of the prisoner. The force of the demurrer would have been that such fact did not constitute any objection to, or disqualification of, the proposed juror.

This would have presented a distinct *issue of law* properly addressed to and necessarily triable by the court. If the court had sustained such demurrer, the decision would have clearly been one of *law*, and to which an exception would have laid.

But an issue of *fact* having been joined upon the challenge, it seems that it was referred to the court for trial. This is the general practice at the present day, but it rests upon no authority on the part of the court to decide a disputed question of fact,

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It is generally a matter of consent, express or implied, at the trial, and most convenient for the dispatch of business, that the court should try and dispose of this issue. Without such consent the challenge for principal cause, like the challenge to the favor, when there is dispute about the facts, should strictly be referred to triers. (*The People v. Derrick*, 6 Cow., 559; 2 Park. Crim. R., 230; *State v. Ellington*, 7 Iredell, 63; *State v. Benton*, 2 Dev. and Battle, 207.) No objection seems to have been made to the trial of this issue by the court, and no exception is taken on that account, or to that mode of proceeding in disposing of this issue. It was so tried, doubtless, by the tacit consent of the counsel, and in accordance with the customary practice at the Circuit and Oyer and Terminer.

Assuming, then, that the issue of fact presented upon this challenge was properly referred to the court for trial, the burden of proof was upon the prisoner to establish by evidence the truth of the facts alleged as the basis of the challenge. (2 *Virginia Cases*, 378.) The ground of the challenge is, that the said Johnson M. Tower "had formed and expressed an opinion touching the guilt of the prisoner."

The question then arises, what kind of a *formed* and *expressed* opinion it was necessary to prove to sustain the challenge. This, it is well settled in numerous cases, must be a *fixed, absolute, positive, definite, settled, decided, unconditional* opinion. The rule is uniformly laid down by the use of one of these words, or words of equivalent force. (4 *Denio*, 9-84; 3 *Id.*, 133-9; 4 *Wend.*, 229, 243; 8 *John.*, 347; 1 *Denio*, 281; 4 *Wend.*, 243; 2 *Virginia Cases*, 378.) A *conditional, contingent, hypothetical, indeterminate, floating, indefinite, uncertain* opinion will not do, nor an *impression*, idem. (*Mann and Glover v. Glover*, 2 *Green*, 195; *Ex parte Vermilyea*, 6 Cow., 565; *Durell v. Mosher*, 8 *John.*, 445.)

Tested by this rule in regard to what the opinion must be to sustain the challenge, let us see if the prisoner proved the juror to have formed and expressed *such an opinion*.

The juror was himself called as the witness in support of the challenge. He testified "that he had read part of the accounts

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of the transaction in the newspapers," and said, "I think I have an impression as to the defendant's guilt or innocence; I rather think I have formed an opinion; I presume I have expressed it; I think I retain it." On cross-examination, he said, "I formed an opinion if the accounts were true; I rather thought they were true; so far as I read I gave them credence." On further direct examination, he said: "I rather think I believed the accounts were true; it might or might not require evidence to remove my impression of the defendant's guilt." To a question put by one of the court, he answered: "I did not arrive at a definite opinion."

Upon this evidence the court decided that the challenge was not sustained, and overruled the same; or, in other words, the court decided that the prisoner had failed to prove the issue on his part, that the juror had formed and expressed any such opinion, in respect to his guilt or innocence, as disqualified him to act as a juror. The court decided, as matter of *fact* upon this evidence, that the juror had not expressed or formed any *fixed, settled, definite, absolute, unqualified or positive* opinion in respect to the guilt of the prisoner.

This was the finding of the judges of the Court of Oyer and Terminer upon the *issue of fact* submitted to them. This is their interpretation of the force and effect of the evidence made at the time, after hearing the testimony, and seeing the juror, and observing the temper, tone and manner in which he gave his testimony.

With the juror thus before them, I think they were much better qualified to decide this question of fact than this court can be, or any court of review. And in my opinion, their finding upon this question of fact, is, and ought to be, final and conclusive. They were a mere substitute for the triers in finding this question of fact, and confessedly there is no review of the decision of the triers when the question is submitted to them. No exception will lie upon a question of fact. The statute declares that: "On the trial of an indictment, exceptions to any decision of the court may be made by the defendant in the same cases and manner provided by law in civil

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cases." (2 R. S., § 21, 725.) Exceptions never lie in civil cases, except for decisions upon questions of law. It is the province and duty of the court to decide the *law*, and of the jury to decide the facts, and triers stand in the place of the jury. To the decisions of the court upon the *law*, exceptions lie, but never to decisions upon the facts, or in collateral proceedings other than upon the main issue. (4 *Denio*, 21.) The exception therefore taken to the finding of the court upon the evidence upon this challenge, I think not well taken or allowable. It does not bring up that decision for review, and this court has no power or right to review such finding. (7 *Iredell*, 63; 2 *Dev. and Batt.*, 207.)

But if this be not so, and if this court is authorized to review the finding of the Court of Oyer and Terminer upon the question of fact, whether the prisoner established the truth of his challenge, it must do so, I think, upon the same principle that it reviews the decision of all inferior courts and officers upon questions of *fact*. It should not reverse such decision, except the finding of the Court of Oyer and Terminer was clearly against the weight of the evidence.

Upon this principle we could never sustain this exception and hold that the Court of Oyer and Terminer decided the facts erroneously, and so clearly so that it was our duty to reverse its proceedings for that cause.

But if this be not so, and we are at liberty to review the decision of the Court of Oyer and Terminer upon this question of fact, as an original question, precisely as if we were sitting in the Court of Oyer and Terminer, and occupying the place of its judges there for the trial of this challenge, then I think the challenge ought not to be sustained, and that the Court of Oyer and Terminer decided the question of fact correctly, and rightly held that Tower was a competent juror.

His testimony does not establish that he had formed any *fixed, settled, definite, positive, absolute or unqualified* opinion in respect to the guilt or innocence of the prisoner. The juror said he had read part of the accounts in the papers, and said, "I *think* I have an *impression*," &c. This amounts to nothing.

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"I *rather think* I have formed an opinion." He is not certain on this point. "I *presume* I have expressed it." He is uncertain still. "I think I retain it." This is certainly not *positive*. It is not an *absolute* opinion—*settled* and *fixed*. Then again: 'I have formed an opinion *if the accounts are true*; I rather thought they were true; so far as I read them I gave them credence." He had read part of the accounts in the newspapers. He knew of no reason to doubt them, and he gave them credence. He knew nothing of the matter personally; was doubtless an entire stranger to the prisoner, and had nothing, at best, more than a mere vague, floating, transient belief in respect to the accounts.

Then again, "I *rather think* I believe the accounts true." Why should he not? What reason had he to doubt on the subject? How could he keep his mind an entire blank, in respect to all impression, from what he read? How could any man of common sense and sensibility, and of common intelligence, refrain from having some sort of impression or opinion? "It might or it might not require evidence to remove my impression of the defendant's guilt." What less could he say? He has nothing but an impression at best. Is this a *fixed* and *positive* opinion? Far from it; it is nothing of the kind. But then he says next expressly, "I did not arrive at a *definite* opinion." Here is an explicit denial of a *definite* opinion. Judge Woodworth (in 6 *Cow.*, 564), speaking of the case of *Durell v. Mosher* (8 *John.*, 445), and of a juror whose fitness was questioned in that case, says: "No definite opinion was expressed or formed. The declaration was hypothetical."

It is quite apparent that this juror had nothing but a loose, vague, floating, unfixed, hypothetical opinion. Every expression throughout his evidence is guarded and careful. He does not testify like a *positive man*, hasty to judge and prompt to condemn. His language is qualified, considerate. He is obviously doubting and uncertain in regard to his own mental state and mental operations. He refers to his consciousness for his impressions, with hesitation and carefulness, and yet with an obvious purpose to conceal nothing and suppress nothing. It

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is obvious from his examination that he is an upright, conscientious man, who rather shrunk from serving on the jury, and would not seek the place by any concealment of his opinions or suppression of his inmost thoughts or slightest impressions. The fact that he placed credence in the newspaper statements amount to nothing. In *The People v. Honeyman* (3 Denio, 821) the court say: "If, for example, the juror has heard, or has read in a newspaper, that the prisoner is guilty of the crime laid to his charge, and has given credit to the statement, it would not be a wise or judicious act, on the part of the triers, to set aside the juror, unless they found that he had such a *settled opinion* concerning the prisoner's guilt that he could not disregard what he had read or heard out of court, and render a verdict on the evidence alone."

In *Freeman's case* (4 Denio, 84), Judge Beardsley, speaking of the challenge for principal cause to the juror Beach (which was quite like this case), says, "the challenge was correctly overruled." He had only an impression that the prisoner was guilty, but nothing which deserved to be called an *absolute opinion*." So here, Tower had no *absolute opinion*.

In *State v. Potter* (18 Conn., 167), the juror was challenged for principal cause, and on his examination said he had read certain newspaper accounts in relation to the supposed murder, and among them was what purported to be the *confessions* of the prisoner. Upon hearing them read, he *was of the opinion* that, if these accounts were true, a horrid murder had been committed. The challenge was overruled, and the Supreme Court sustained the decision,—Williams, Chief Justice, saying in his opinion: "It is perfectly evident that he had no opinion upon the case itself, but he did think, if the facts were as stated in the *prisoner's confession*, a horrid murder had been committed. This is a mere hypothetical opinion;" and referred to *Durell v. Mosher* (8 John., 847), where the juror challenged, said, "that the defendant was wrong and the plaintiff right;" but also, "that he had no personal knowledge of the matter in dispute, but that if the reports of the neighbors were correct, the defendant was wrong and the plaintiff right." The court

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held the juror competent, and that his declaration was merely hypothetical.

In the case *ex parte Vermilyea*, 6 Cowen, 565, it is stated that Chief Justice Spencer, in a manuscript opinion referring to a case tried before him of murder, held, that "if a person had formed or expressed an opinion for or against the prisoner, *on a knowledge of any of the facts attending the murder*, or from *information of those acquainted with the facts*, he considered it a good ground of challenge, but if the opinion of the juror was formed on mere rumor or reports, he decided that such an opinion did not disqualify."

In 3 *Leigh*, 785, the Court of Appeals of Virginia say, that "a juror must have formed and expressed a *decided opinion* to be disqualified."

In 9 *Leigh*, 650, in reviewing the evidence in respect to two jurors who had heard the reports of the case, and one of them part of the evidence, the court say: "When atrocious acts are committed, they necessarily become the subject of conversation and remark, leading to impressions and opinions, favorable or unfavorable to the party accused; but when such opinions have not impressed the mind with *strong and decided convictions*, by which the *justice and fairness* of the juror's decision upon the evidence may be influenced, we think that no disqualification is produced;" and to the same effect is the current of the decisions in the Virginia courts.

But we are referred to the case of *Cancemi* (16 *N. Y. Rep.*, 504), as controlling this. In that case, the juror stated that he had formed an opinion and expressed it, and when cross-examined, said that "he had no fixed opinion—none which could not be removed by evidence."

The Court of Appeals hold, in effect, that this declaration of the juror in respect to the opinion formed, and the state of his mind, imported a *fixed opinion*, and implied a preconceived bias, which disqualified the juror. This is an authoritative decision, and binding upon the case and facts presented, but I think by no means covers this case. The juror said, "he had no opinion which might not be *removed by evidence*." But

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the juror should not have an opinion that would convict without evidence was given to change it. He should start with no such opinion. The prisoner should not be required to *remove any opinion* by evidence before the juror could begin to hear the evidence impartially. So long as the evidence upon the principal challenge is directed to see, merely, whether an opinion has been formed or expressed, and the question is submitted to the court, as upon demurrer to the evidence upon such a bare naked statement of the juror, as was the case in this instance, the court must hold that such a juror is disqualified. The decision of the Court of Appeals upon the facts stated, concurs with the general current of decisions where the principal challenge is thus passed upon by the court, and I think was clearly right. But it is quite apparent that this decision involves a radical mistake and misconception in fact, in regard to this juror. His further examination on the challenge to the favor before the triers, fully discloses such mistake. Before the triers he said that "his mind was balanced; that he did not know that he had an *impression* or *opinion* that had not been removed by the former trial—the jury not being able to agree." If this evidence had been before the court on the principal challenge, it could not have held as matter of fact or law, that this was a fixed or positive opinion.

This juror obviously did not mean to say, on his examination upon the principal challenge, that he had such a *formed* opinion that he could convict without evidence, or contrary to evidence; that he had any actual bias, in point of feeling or preconceived opinion, that would interfere with the proper discharge of his duty to render a just and true verdict according to the evidence. What he doubtless really meant, if his mental operations had been analyzed, and their results more carefully stated, was that he had read the accounts of the murder in the newspapers, and from such statements he had formed the opinion that the prisoner was guilty, and that if the testimony on the trial fully sustained such reports, and there was no contradictory testimony to impeach their force, or remove the weight which they had in his mind, then he should probably remain

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of the opinion formed. This would have been mere hypothetical opinion, and imported no actual bias, and involved no legal or moral disqualification of the juror (7 *Grattan*, 594; *Id.*, 607), and thus shows how unfit it is, that the challenge to a juror, that he had formed and expressed an opinion upon the guilt or innocence of the prisoner, when there is any dispute about the facts, should be half tried by the court, and in such shape as to become a question of law and form the ground for an exception, and the other half of the issue tried by the triers on the challenge to the favor. Human language is so imperfect, at best, as a representative of thought, and written language so much more liable to misrepresentation and misconstruction, when considered and reviewed by itself, remote from the time and occasion when it was used, and there is also such a liability to misunderstand or misquote a witness or juror, that it is altogether more safe and just to the juror and the cause of truth, to trust to the impression made at the time by the testimony upon those who heard it, noticed the manner, tone, appearance, and personal peculiarities of the juror while under examination, and subjected to the watchful scrutiny of the court, counsel and jury, in the court room, than to any written or reported statement of his testimony afterwards. Mr. Tower was subjected to this ordeal.

It appears that after the principal challenge was overruled he was challenged to the favor, and after other evidence offered, the arguments of the counsel, and a charge by the court, the triers found the juror indifferent. That upon such further trial, the examination of the juror, and the further evidence given, satisfied the court, the triers, and the counsel for the prisoner, that the juror was a fair, impartial and candid man, with a mind free, ingenuous and open to hear the evidence, and to allow it to have its proper weight and influence in the finding of the verdict he was required to give, I think may fairly be inferred from the finding of the triers, and the fact that the prisoner did not use his right to a peremptory challenge, and exclude the juror. I cannot think that objection or exception to the juror in such a case, upon the question of his indiffer-

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ence, which is really a *single* issue, ought to go any further, if there be no exception to the charge to the triers, or that an exception to the disposition made by the court of the principal challenge, if it be allowable, should not be deemed superseded by the fuller examination and decision of the same question of fact by the triers.

In a capital case, the prisoner has twenty peremptory challenges. In the exercise of this right with that of challenges for principal cause and to the favor, a prisoner can, and virtually does, pick the jury for his trial. In a case of any degree of notoriety, a panel of one hundred jurors at least may and ordinarily will be exhausted before a jury can be impaneled.

Trial by jury is one of the noblest inventions of man for the proper administration of criminal justice, and one of the most important of the constitutional rights of every American citizen. And it is obviously of the essence of this right, that whoever is subjected to a trial upon any criminal charge, should have a *fair and impartial* jury. To secure and protect this right, to guard it with the utmost care and vigilance, is the clear duty of all courts. But in my opinion it is quite a mistake to suppose that impartial juries are most likely to be secured by rules for testing the fitness and indifference of individual jurors—so strict and artificial as to exclude from the jury box such a juror as Mr. Tower. Such rules will practically proscribe intelligence, and tend to render jury trial a virtual impracticability in the locality where high crime is committed.

I think Mr. Tower was a proper juror, and that no error was committed by the Court of Oyer and Terminer in overruling the challenge to him as such juror, and that the exception to such decision is not well taken.

Secondly. The second exception is for allowing proof of the incestuous connection between the prisoner and Mrs. Littles.

At this stage in the trial, when the evidence objected to was offered, it had been proved that the body of Charles W. Littles had been found dead in the Genesee river, on the morning of the 20th of December, 1857, and that from the appearance

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of the body, the place where it was found, from the appearance of blood on the bank at a considerable distance from the body, and the condition of the slope of the bank down which the body must have fallen, it was evident that the deceased came to his death by violence committed on the bank above, from whence he had been removed to the place where he was found.

Much evidence had been given tending to show that the prisoner and Sarah Littles, the wife of the deceased, and who was jointly indicted with him for the murder, were present at the place where the crime was committed, at the time of its commission, and tending to show that they, or one of them, committed the homicide.

After such proof, the evidence in question was offered. It was objected to, and the objection was overruled, and the evidence received, to which the prisoner's counsel in due form excepted. It does not appear, from the bill of exceptions, with what view the evidence was offered, nor is it stated whether any discussion of the point took place, or upon what ground the decision to receive the testimony was put at the time by the court.

Whether it was admissible for any legitimate object or purpose, is therefore the question now presented for our consideration.

It is a fundamental rule of evidence, applicable to all trials, and to criminal trials especially, that the evidence must be confined to the point in issue. The sole object and end of evidence is to establish or disprove the disputed facts or points in issue between the parties. No evidence ought, obviously, to be received that is not adapted to that end. And it is also essential that the evidence be material and pertinent to the establishment of a material issue, and its materiality must always depend upon the subject matter to which it is directed, and the evidence should be considered and weighed, and passed upon according to its relation to such subject matter.

The first and leading point in issue on this trial was, whether the prisoner was guilty of committing the homicide in ques-

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tion; and secondly, if so guilty, was the crime committed with premeditation, or without any intent to kill; whether, if the defendant was guilty of the killing, the crime was murder or manslaughter. To give character to the crime, and to show that there was design and premeditation in respect to its commission, was obviously proper. Evidence tending to show premeditation and design, was clearly within the issue, and was, in fact, evidence to prove the body of the crime. This evidence may be, and in most cases is, circumstantial. It consists in proof of such acts, declarations, and conduct on the part of the accused as afford or tend to establish a reasonable presumption of design or guilty intent.

To attempt to prove a prisoner guilty of one crime by proving him guilty of another, would be clearly inadmissible.

Nothing is more palpable than that it would be the height of injustice to infer the guilt of a person of one felony for which he was on trial, by proving him guilty of some other distinct crime.

The prisoner and Mrs. Littles were brother and sister, and sexual intercourse between them would be incest, and this would be a high criminal offence, punishable in the State prison for the term of ten years. (2 R. S., 773, § 12.)

Proof of this crime committed by them, has obviously no necessary connection with the crime of murder, for which the prisoner was indicted, and was clearly not admissible upon any such principle.

When several felonies are connected together as parts of one scheme or plot, like the different acts in a drama, and all tend to a common end, then they may be given in evidence to show the process of motive and design in the final crime. In such case, the several crimes are part of a chain of cause and consequence, so linked together as to be necessarily provable as several parts of the same act or crime. (17 *Alaba.*, 618, 625 2 *Id.*, 229; 4 *C. & P.*, 221; 19 *Eng. C. L. R.*, 354; 1 *Leigh*, 514; 4 *Humph.*, 27; *Roscoe Cr. Ev.*, 81; *Burrill Cr. Ev.*, 290.) The ground upon which this evidence was offered and received

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and was claimed to have been admissible, is now claimed to be to prove motive.

The prisoner had committed adultery with the wife of the deceased, and he had committed incest with his sister. The husband might avenge the wrong. He might expose the common crime of the prisoner and his sister, and seek to bring them to punishment for their crime. His knowledge of the crime, and his ability by his own evidence to convict them of its commission, and cause the prisoner to be sent to the State prison for a long period of his life, it is supposed may have constituted a strong motive with him and Mrs. Littles for the commission of the murder.

I cannot see why this is not so, and why the evidence was not proper for the consideration of the jury. It seems to me that it bears clearly upon the question at issue. Did the prisoner commit the crime? Had he any *motive* to do so? The relevancy of evidence depends upon the nature and circumstance of the particular case. Whatever fact tends legitimately and fairly, according to the ordinary operation of the human mind, and the ordinary principle of human conduct, to show *motive*, may properly be given in evidence, in proof of any assumed motive for the commission of crime.

If the prisoner and Mrs. Littles had not been brother and sister, so that they could not inter-marry, no doubt, I think, would have existed on the point. In such case, I think it would have been quite apparent that a sufficient motive would have existed in the case, and that it was proper to show a criminal intimacy between them. It would have been apparent in such case that they might have a motive to get rid of the husband, that they might more safely continue their criminal intercourse. But if they were vile enough to be guilty of incestuous connection, and that, as it appears, more or less openly, grossly and continuously, why might they not desire to get the husband out of the way for greater security? The affections of the wife towards her husband were obviously gone. She desired, in June previously, to take measures for a divorce. To get rid of him was evidently an object of desire

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with her, and after her brother, the prisoner, came into close intimacy with her, and certainly after the incestuous intimacy had been discovered, it is very likely that they formed the common purpose to get him out of the way, and had a strong motive for such minds so to do. At least it was, to my mind, a very proper matter for the consideration of the jury on the main issue, both as to the fact of killing, and as to the pre-meditation with which it was claimed to have been done.

In *State v. Watkins* (9 Conn., 47), the prisoner was indicted for killing his wife, and on the trial the court allowed the People to prove that he had had an adulterous connection with another woman. This was held to be proper by the Supreme Court of that State, and is a case quite in point.

If in this case it had been supposed that the purpose of the husband was to get rid of his wife, that he might marry the woman with whom he had had criminal intercourse, the proof of their intimacy might obviously have been given as a motive for the murder.

In *Rex v. Clewes* (4 Car. & P., 221; 19 Eng. Com. Law, 854), proof of a previous murder was allowed to be given in evidence for the purpose of showing motive for the commission of the second murder, for which the prisoner was on trial, it being alleged that the motive to the second murder was, by killing the witness, to destroy all evidence by which the prisoner might be connected with, or convicted of the former offence.

In *Dunn v. The State* (2 Ark., 229), proof of a previous murder was permitted to be given in evidence to show motive, it appearing that the person killed, and for which murder the prisoner was on trial, had been making inquiries and seeking to detect the person guilty of the former murder.

It is impossible to define by any rule, or put limits upon the facts that may be given in evidence in proof of motive, except that they must relate to the subject matter, and be rationally adapted to establish the fact in issue. It is not necessary that the connection be so intimate as that the proof of one fact un-

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avoidably involves or draws after it the other, as a legitimate and necessary consequence from an appropriate cause. It is sufficient if the evidence fairly tends to prove the assumed motive, and the jury may rationally and properly imply the motive from the act sought to be given in evidence. (*State v. Baalam*, 1 *Starkie Ev.*, 502; 1 *Ala.*, 451.)

So various are the motives which govern men, and so indefinable that every case must necessarily be governed by its own particular circumstances. As various as are the objects of ambition, passion or desire among men, so various may be the machinations and motives to crime, and so various must necessarily be the kind and species of evidence adapted, and proper to be received, to explain the motives and principles of human conduct, to unravel and reveal the webs and wiles of criminal purpose, and bring the offenders to justice.

I think no error was committed in receiving the evidence in question, and that the exception to its reception is not well taken.

The counsel for the prisoner makes another point: That the court cannot consider or weigh the question whether the prisoner be guilty of the crime charged. If errors have been committed, the judgment must be reversed and a new trial awarded. This is clearly so, and I agree with that point entirely.

If any substantial error has been committed, even though we are fully satisfied of the prisoner's guilt, and that a new trial would probably result in the same verdict, it would be our duty to grant a new trial. I fully agree with the remark of Judge Selden, in the case of *The People v. McMahon* (15 *N. Y. Reports*, 397), that "however clear the proof of the prisoner's guilt in this case may be, it is better that the People be put to the trouble of establishing it upon a second trial, than that the force of a salutary rule, upon which life may often depend, should be impaired."

But while this is true, it is obviously due to the public interest and to the faithful administration of public justice, that courts

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of review should not reverse the proceedings of inferior courts upon slight and trivial grounds.

In this case, upon the whole, I am clearly of the opinion that no material error was committed by the court below, and having no doubt in respect to the justice and propriety of the verdict, it is our duty not to interfere with it, but leave the law to take its course.

The judgment of the Court of Oyer and Terminer should be affirmed.

Judgment affirmed.

SUPREME COURT: At Chambers, Rochester, October 2, 1858. Before
T. R. Strong, Justice.

IRA STOUT, plaintiff in error, v. THE PEOPLE, defendants in error.

A writ of error, to review in the Court of Appeals a judgment rendered in the Supreme Court, on an indictment for a capital offence, cannot be issued, unless allowed by a judge of the Court of Appeals, or justice of the Supreme Court, or a county judge; and such writ of error will not stay or delay the execution of such judgment, or of the sentence thereon, unless it be expressly directed in the allowance that the writ shall operate as a stay of proceedings.

Such writ ought not to be allowed and the proceedings stayed, unless it is probable an error has been committed, or unless real doubt may well be entertained as to the correctness of the decisions sought to be reviewed.

A question of fact on a principal challenge, in the absence of consent to a different mode of trial, is properly triable before triers appointed by the court. It is competent, however, for the parties, by consent, to waive the appointment of triers, and submit to the court the question of fact for its decision; and such has become the general practice.

The determination of the court, on a question of fact thus submitted, cannot be excepted to, and is final. It stands in that respect upon the same footing as if it had been made by triers, and cannot be reviewed on error.

Mere hypothetical opinions, though legal evidence to be considered on a challenge for favor, will not sustain a challenge for principal cause.

On the trial of an indictment for murder, evidence on the part of the prosecution of a fact tending to prove a motive for the commission of the homicide, ought to be received, although the fact thus offered to be proved, amount itself to a distinct felony.

THIS was an application made at chambers to the Hon. Theron R. Strong, one of the justices of the Supreme Court, for the allowance of a writ of error with stay of proceedings. The facts are sufficiently stated in the opinion deciding the application.

J. N. Pomeroy, for the plaintiff in error.

C. Huson, Jr. (District Attorney), for the People.

T. R. STRONG, J. By the Revised Statutes, a writ of error upon a judgment rendered on any indictment for a capital

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offence, cannot be issued unless allowed by one of the justices of the Supreme Court; and a writ of error, when allowed, will not stay or delay the execution of such judgment, or of the sentence thereon, unless it be expressly directed in the allowance that the writ is to operate as a stay of proceedings. (2 *R. S.*, 740, §§ 14, 15.) Under the judiciary act of 1847, the power to allow the writ and direct a stay of proceedings, is extended to a judge of the Court of Appeals and to a county judge. (1 *Laws* 1847, 822, § 11.) The rule of decision upon an application for the allowance of the writ and a stay of proceedings, is not prescribed by statute, but I think the opinion of the Legislature, as to the proper rule in the case, is to be found in the provision of the statute for a stay of proceedings on exceptions taken in the Court of Oyer and Terminer, or Court of Sessions, on the trial of an indictment. That provision is, that a bill of exceptions being settled and signed, if the officer specified in the statute shall certify on such bill, "that, in his opinion, there is probable cause for the same, or so much doubt as to render it expedient to take the judgment of the Supreme Court thereon, such certificate, on being filed with the clerk of the court, shall stay judgment on such indictment until the decision of the Supreme Court taken upon such exception." (2 *R. S.*, 736, § 23.) The rule here given is a reasonable one to adopt in cases like the present, refusing, as it does, the allowance of a review of decisions upon points which are frivolous, or clearly untenable, and at the same time permitting the re-examination of questions, in relation to which there is ground for fair doubt and difference of opinion. The policy of the requirement of an allowance of a writ of error to warrant the issuing of it, and of an express direction of the officer allowing the writ that the writ be a stay of proceedings, to give it that effect, is, doubtless, that the writ may not be made a means of useless and injurious delay of execution of the judgment. Where it is probable an error has been committed, or real doubt may well be entertained as to the correctness of decisions which it is sought to have reviewed, the writ is to be allowed and the order granted; but in no other case.

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Taking this rule as a guide, and anxiously desiring to do no injustice to the plaintiff in error, I have carefully examined the grounds of the present application ; and I proceed to state briefly my views in relation to them :

1. One of these grounds is an alleged error in sustaining a decision of the court below overruling a challenge to a juror. One Tower, on being called as a juror, was challenged by the defendant below, who is now the plaintiff in error, for principal cause, on the ground that he had formed and expressed an opinion touching the guilt of the prisoner ; and the district attorney traversed the challenge. This traverse put in issue the fact alleged in the challenge, and made it necessary to try the question whether the juror had formed such an opinion. The legal mode of trial, in the absence of consent to a different mode, would have been by triers appointed by the court to receive the evidence which should be offered in regard to it, and decide the question. Upon their decision, if the triers found that the juror had formed an opinion in the case, the question of law involved in the challenge, whether the fact of such an opinion constituted a disqualification as a juror, would have been for the court to determine. The decision of the triers as to the fact, would not have been the subject of exception, or review on error ; but it would have been otherwise as to the decision by the court on the law arising upon the fact found by the triers. If the triers found against the formation of an opinion by the juror, the challenge would of course have been overruled, as unsupported in fact. It was competent, however, for the parties, by consent, to submit to the court the trial of this question of fact, waiving the appointment of triers ; and that has come to be a very general practice, and it appears to have been pursued in this case. The effect of referring to the court the ascertainment of the fact on which the challenge rests, in such cases, is that the court is substituted for triers ; it is made the trier of the question with the like incidents and consequences as if triers had been appointed by the court, and they had tried the issue. The determination by the court of the fact cannot be excepted to, and is final. But its decision

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of the question of law on the fact, may be excepted to, and brought under review on error.

The challenge having been traversed as above stated, in support of it, Tower, the juror, was sworn and examined as a witness, and testified: "I have read part of the accounts of the transaction in the newspapers; I think I have an impression as to the defendant's guilt or innocence; I rather think I have formed an opinion; I presume I have expressed it; I think I retain it." On his cross-examination he testified: "I formed an opinion if the accounts were true; I rather thought that they were true; so far as I read I gave them credence." On his re-direct examination he testified: "I rather think I believed the accounts true; it might or might not require evidence to remove my impression of the defendant's guilt." To the court: "I did not arrive at a definite opinion." No further evidence was given on the challenge. The court thereupon overruled the challenge, to which an exception was taken. The juror was sworn, and sat as such during the trial.

This evidence of the juror presents the state of his mind in regard to an opinion as to the guilt or innocence of the defendant below; the evidence is wholly uncontroverted; and the only question was, whether the state of the juror's mind, in respect to such an opinion, as exhibited by this evidence, rendered the juror incompetent. There was no question of fact upon the evidence, but only one of law upon the legal effect of the evidence as to the competency of the juror. This view of the true question on the juror's testimony, is fully supported by the case of *Ex parte Vermilyea and others* (6 Cow., 555), and *The People v. Vermilyea* (7 Cow., 108), and other cases. And in that view, as is above shown, and as was held in the case first cited, the decision of the challenge might legally be excepted to, and be re-examined by a higher tribunal when properly brought before it.

The question of the correctness of the decision overruling the challenge, is therefore fairly in the case, and hence it is necessary to examine it so far as to see whether there is probable cause for believing it erroneous, or there is so much doubt

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in regard to its accuracy that it is expedient to allow it to be reviewed.

The substance of the testimony of the juror is, that he had read in the papers part of the accounts of the transaction; that so far as he read them he gave them credit; that he formed an opinion in the case dependent on the truth of the accounts, and had expressed it; but it was not a definite opinion. The grammatical and legal import of this testimony, is, that the juror had a hypothetical opinion as to the guilt of the accused; that is, that the accused was guilty if the accounts he had read were true; but whether the accounts were true or not, he had no distinct certain conviction. It expresses a state of mind which would be produced in any intelligent man, a stranger to a transaction and the parties connected with it, in regard to the facts of the case, who should read in a book or newspaper an account of the case supporting those facts, and apparently entitled to credit. The account would be received as true, and a conclusion formed from it, if true; but this conclusion would depend wholly upon its supposed truth, and as to its truth only a mere supposition would be entertained. This would not ripen into a clear and fixed conviction, unless verified by satisfactory evidence. The law does not pronounce persons, whose minds are thus affected in respect to a case, disqualified to act as jurors upon the trial of it; and there does not appear to be any good reason why it should do so. There is nothing in that state of mind which necessarily implies bias, and from which the law adjudges the juror not indifferent between the parties. The mind, in such a case, is in a condition to receive and decide impartially upon the evidence presented to it, and that is the material consideration on the trial of a challenge like that in question.

These remarks are made solely in reference to challenges for principal cause, for having formed an opinion, and such is the challenge in the present case. A principal cause of challenge is where the cause affords a manifest presumption of partiality; where the law implies partiality from the ground of challenge, without inquiring, if the ground be proved, whether in fact

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the juror is biased. It adjudges, from the cause alleged and proved, that he is so, and excludes him as a juror. An opinion to sustain a challenge for principal cause, must be, in the language of the books, a fixed and absolute opinion. It is only opinions of that character which the law regards as necessarily implying partiality. It does not thus regard mere hypothetical opinions. Although opinions of the latter character are legal evidence upon the trial of a challenge for favor, where the question of bias is a question of fact, they do not constitute a principal cause of challenge.

I am satisfied that the opinion proved in support of the challenge in this case, was merely hypothetical; that it did not sustain the challenge, and that the challenge was properly overruled.

The remark of the juror, in the course of his examination as a witness, that "it might or might not require evidence to remove his impression of the defendant's guilt," does not strengthen, but rather weakens, the effect of the whole evidence to sustain the challenge. It shows the juror had no fixed opinion. A fixed opinion would require evidence to remove it. And it was for the party interposing the challenge to prove such an opinion.

2. The only other position urged in support of this application is, that the court below, at the trial, erred in admitting evidence tending to establish an incestuous connection between the accused and his sister, Mrs. Littles. The indictment was against the accused and Mrs. Littles jointly; and evidence was given on the part of the People proving, in addition to the homicide, difficulties between Mrs. Littles and her husband, upon whom it was alleged in the indictment the crime was committed, and implicating both the defendant below and Mrs. Littles in the killing of the deceased, after which the district attorney put the following question to a witness: "Do you know whether Ira and Mrs. Littles ever slept together?" This question was objected to; the objection was overruled, and an exception taken. Evidence was then given on the part of the People that Ira and Mrs. Littles were in bed together on different

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occasions, and that on one occasion the deceased saw them in that situation, and made no complaint.

The object of this evidence manifestly was, to prove a motive in the mind of the defendant below to take the life of the deceased; that the homicide was premeditated by him, and therefore that his participation in it was murder. It is very clear, I think, that the evidence strongly tended to establish that part of the case, and was rightly received for the consideration of the jury. If the relation of brother and sister had not existed between the defendant below and Mrs. Littles, no question could exist, as the case stood when the evidence was allowed, as to the right of the People to prove illicit intercourse between them for the purpose to which the evidence under consideration was offered, whether the deceased knew of it or not. The motive which it tended to prove was, to remove the deceased out of the way, to relieve Mrs. Littles from her difficulties with him, and to afford more full and free and safe opportunity to him for vicious intercourse with her. I am not able to perceive how the fact of that relationship can vary the case as to the propriety of such evidence. The evidence was of the same character as that received to prove the difficulties referred to, and the nature and extent of them. Any evidence proving the relations of intimacy between the defendant below and his sister, was clearly competent on this question of motive, as tending to show influences on his mind to aid her in her troubles, and for that purpose to commit the offence charged. The weight of this evidence was for the jury; it was admissible as tending to prove an important fact in the case; but it was the duty of the court in charging the jury, to submit, in connection with the evidence, proper instructions, limiting its effect to the point upon which it was received. There is no complaint that such instructions were not given.

Upon neither of the grounds on which this application is based, is the case, in my judgment, brought within the rule above stated, as proper to control the decision as to the allowance of a writ of error. I am constrained, therefore, to decline to allow the writ.

SUPREME COURT. New York General Term, November, 1858. *Davies, Sutherland and Hogeboom*, Justices.

PETER FRANCISCO, plaintiff in error, *v.* THE PEOPLE, defendants in error.

A pilot, within the meaning of chap. 69 of the Laws of 1847, regulating Hellgate pilots, is the person piloting and directing the vessel while on board of it. It is no offence against the act for the pilot of a steam tug to take a schooner through Hellgate, lashed to the side of the steam tug, the pilot of the steam tug remaining on his own steamer, and making signals to those on board the schooner to change their helm to conform to the movements of the steamer.

It is erroneous, in such a case, to charge, that in so towing the schooner through Hellgate the pilot of the steam tug was committing an act of pilotage.

Steamboats have a right to tow vessels through Hellgate without being subject to the law relating to pilotage, being excepted from its operation by the 10th section of the act of 1847.

CERTIORARI to the General Sessions of the Peace of the city and county of New York.

The plaintiff in error was the pilot of the steam tug *H. Minturn*, and was indicted and convicted in the court below of a misdemeanor, in violating the provisions of the statute that prohibits any person, except a licensed pilot, piloting a vessel through Hellgate. It was proved on the trial that on the 7th of May, 1857, two schooners, the *George* and the *Humming Bird*, were lashed to the steam tug *Minturn*, one on each side, and thus taken through Hellgate by the defendant, he being on the steamboat piloting it, and making signals to those on board the schooners to change their helms to conform to the movements of the steamer.

The counsel for the defendant asked the Recorder to charge the jury that if they believed the act done by the defendant on this occasion was one of towage only, that the defendant must be acquitted, for the offence was not one contemplated by the act. The judge so charged, but with this qualification, that if the defendant directed and controlled the movements of the

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steamer, and was the controlling spirit, then the act was one of pilotage, to which the defendant's counsel excepted.

The counsel for the defendant also asked the Recorder to charge that the steam tug Minturn, being a steamboat propelled by steam, had a right to tow vessels through Hellgate without being subject to the laws relating to pilotage. The Recorder refused so to charge, and the defendant's counsel excepted.

D. McMahon, for the defendant

John McKeon, for the People.

By the Court, DAVIES, P. J. The appellant was indicted in the General Sessions, and convicted of a misdemeanor, in violating the provisions of chap. 69, Laws of 1847, relating to the Hellgate pilots.

That act provides that there shall be appointed by the Governor and Senate, fit and proper persons to act as pilots for the safe pilotage of vessels through the channel of the East river, commonly called Hellgate. The act provides for compensation for such service, and also provides that any pilot who shall first tender his services to any vessel passing through the gate, and whose services shall not be accepted, shall be entitled to demand and receive half-pilotage.

The act further provides, that if any person other than a Hellgate pilot shall pilot for any other person any vessel of any description through the channel of the East river, commonly called Hellgate, he shall forfeit and pay the sum of thirty dollars for each offence, or, on conviction thereof, shall be deemed guilty of a misdemeanor, and shall be punished as such; and the act also declares that it shall not be construed as applying to steamboats.

It is conceded that the piloting of the steamer was no offence under the act, for it is expressly excepted from its provisions. But it is insisted, on the part of the People, that the act of taking the two schooners through the channel in the

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manner stated, was an act of pilotage within the meaning of the act, and which it has made an offence.

The duties of the pilots authorized by the acts to be appointed and to act as pilots, for the safe pilotage of vessels through the channel commonly called Hellgate, are prescribed by law; and any person not such pilot, who shall pilot any vessel, is made subject to the penalties of the act. *Bowyer's Law Dictionary* (vol. 2, 387) defines a pilot to be: first, an officer serving on board of a ship during the course of a voyage, and having the charge of the helm and of the ship's route; and secondly, an officer authorized by law, who is taken on board at a particular place for the purpose of conducting a ship through a river, road or channel, or from or into a port.

This definition would seem to carry the idea that the pilot is to be put on board the ship piloted—that he is not, in the legal sense, a pilot unless on board the ship which he is conducting through a river or channel. Could he be said to be a pilot if he stood on the shore and directed the course of the vessel by signals, or ran along the banks of the stream and by words or signs controlled and directed the course of the vessel navigating the stream? We think not; and that the intentment of the act was to apply to the pilots on board, piloting and directing the ship or vessel while on board of it. The defendant was conducting the steam-tug through the channel of the East river, as he lawfully might do. The two schooners which it is claimed he piloted, were lashed to the steamboat, and must necessarily obey its every motion. As a consequence, they were piloted through the channel, and so they would have been if placed on the deck of the steamer. It is true the persons on the schooners had to obey and did obey signals given to them by the defendant while on board the steamer. He might have given the same if on the land; but we do not see that this circumstance determines that he was piloting the schooners.

We have not seen any decision of our courts upon the proper construction to be given to this statute, upon the point now presented for consideration. But a case has been decided

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by the English Court of Exchequer, upon a similar statute, which seems to us of high authority and quite controlling. The language of the English statute is (6 *Geo.*, 4th *chap.* 125, § 70): "Every person assuming or continuing to act *in the charge or conduct of any ship or vessel*, without being a licensed pilot, after any licensed pilot shall have offered to take charge of such ship or vessel, shall forfeit," &c.

It will be seen that the language of this statute is more comprehensive than ours, and is not so technical in the terms used. Ours is "to pilot," or "piloting;" theirs, "to act in the charge or conduct of any ship or vessel." *Reilly v. Scott* (7 *Meeson & Welsh's Rep.*, 93), was an action to recover a penalty incurred under this statute, for doing an act like that for which the defendant in this case has been convicted of a misdemeanor.

Baron Parke, in delivering the opinion of the court, says: "The first question arising in this case is, whether the defendant had charge of the ship within the meaning of the pilot act. We are of the opinion that he had not. These words are to be understood in the sense ascribed to them in other parts of the act; that is, they mean the taking the charge and direction *as a pilot*, whose appropriate and indeed sole duty is to select the course and take the management and conduct of the vessel, for the purpose of directing her in that course. The master of a coasting vessel may, if he please, perform that duty himself; but if he chooses to employ another for that purpose, he must employ a licensed pilot, and an unlicensed pilot, taking that duty on himself, by command of the master, when a licensed pilot offers his services, would be liable to the penalty in the 70th section.

But the master is not precluded from employing any moving power he may please; he may make use of another vessel or boat, or steam-tug, for that purpose; and if that cannot be done without necessarily devolving upon those who may apply the power, the selection of the course and a certain position, or indeed, all the charge and conduct of the vessel in that course; still, if the *bona fide* object of the employment be the moving power, the person so employed is not a pilot, and has

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not the conduct and charge of the vessel, as such, within the meaning of the act. If, indeed, the real object, in any case, should appear to be to obtain the assistance of the skill of a pilot, and to give him the charge and conduct of the vessel under some colorable duty then assigned to him, the case would be within the act; but in the present instance, it is expressly found that the steam-tug was *bona fide* hired for the purpose of conducting the vessel into the river, and the court, in that case, hold that no penalty was incurred.

It was assumed on the trial of the defendant, that he was engaged in the business of towage. If not, the fifth and sixth requests of the defendant to the judge raised the question, and brought the case within that in the English Exchequer. The fifth request was, that if the jury believed that the act done by the defendant on this occasion was of towage only, the defendant must be acquitted, for that offence was not contemplated by the act, and the judge charged, with this qualification, that if the defendant directed and controlled the movements of the steamer, and was the controlling spirit, then his act is one of pilotage. To this the defendant excepted, and in holding that the defendant, while controlling the movements of the tug, and its master spirit, was committing an act of pilotage, we think the learned Recorder erred. So, also, we think he erred in refusing to charge that the steam-tug Minturn, being a steamboat propelled by steam, had a right to tow vessels through Hell-gate, without being subject to the laws relating to pilotage, and that, by the tenth section of the act of 1847, steamboats were excepted from its operation. We think that, upon the facts proved, the defendant has not been guilty of any offence under the act of 1847, and that there was error in refusing to charge in the particulars mentioned, as requested, and that consequently the conviction must be reversed.

Judgment reversed, and a new trial ordered.

NEW YORK Oyer and Terminer. November, 1858. Before *Mullin*,
Justice of the Supreme Court.

THE PEOPLE *v.* FERNANDO WOOD and sixty-one others.

Giving a lease of real estate belonging to the corporation of the city of New York, for a longer period than ten years, or without having complied with the provisions of the 41st section of the amendment to the charter of the city of New York, passed in 1857 (ch. 446), is the violation of such charter within the meaning of the 40th section of said act, and punishable as a misdemeanor.

The mayor, aldermen and councilmen of the city of New York, are officers of the city government within the meaning of the said 40th section, and, as such, are liable to indictment for willfully doing the acts forbidden by that section, and which are therein declared to be misdemeanors.

A conspiracy by such officers to give a lease in violation of the provisions of such charter, is a misdemeanor; but it is not a misdemeanor, under the said 40th section, for such officers to vote for and pass a resolution directing the comptroller of the city to lease real estate of the corporation for a longer term than ten years, such voting of itself not being an unlawful act, and the statute providing that no aldermen or councilmen shall be questioned in any other place for any speech or vote in either board.

Where a count in an indictment against the mayor, aldermen and councilmen of the city of New York, charged that the defendants "did violate and evade the provisions" of said amended charter, "by voting for and passing a resolution in due form, directing the comptroller to lease" certain real estate of the corporation to the Roman Catholic Orphan Asylum for more than ten years, the count was adjudged bad as not charging any offence under the statute.

THIS was a motion to quash the indictment, on grounds fully disclosed in the opinion of the court.

John W. Edmonds, for the defendant.

Joseph Blunt (District Attorney), for the People.

MULLIN, J. The importance of the questions presented on the motion to quash the indictment in this case, demands a more careful examination than my engagement will permit me to make. I have been compelled, therefore, to confine my examination to two or three of the questions raised, and those

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such as affect the substance, rather than the form of the indictment.

I entertain no doubt as to the soundness of the following positions:

First. That the mayor and common councilmen of this city are officers of the city government, within the true intent and meaning of the 40th section of the amendment of the charter of said city, passed in 1857.

Second. That, as such officers, they are liable to indictment for willfully doing, or permitting to be done, the acts specified in the said 40th section, which are therein declared to be misdemeanors.

Third. That the last clause of section 8 of the amendment to the charter, passed in 1857, does not exempt the mayor or the members of the common council from liability for the acts forbidden by section 40 of that act; but the approval of the mayor, or the vote of the councilmen, does not itself make him or them liable. The offences created by that section, do not consist in approving or voting, but in accomplishing the result prohibited.

Fourth. That giving a lease for a longer period than ten years, or without having complied with the provision of the 41st section of the act of 1857, is a violation of the charter, within the meaning of the 40th section, and punishable as a misdemeanor; and,

Fifth. That a conspiracy by the said officers named in the indictment, to give a lease in violation of the provisions of the charter, is a misdemeanor, and indictable as such.

I will now examine, as briefly as I am able, the several counts of the indictment, in order to ascertain whether they or either of them describe an offence under the statute referred to or at common law. I will first examine the second count. It avers, in substance, that the mayor, aldermen and commonalty is a municipal corporation, and, as such, capable of taking and holding real estate, and of granting leases of and selling the same. That, by the act of 1857, it was declared that no lease of public property thereafter to be given (except as the same might

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be required by covenants of the corporation already existing), should be for a longer period than ten years, and that all leases of public property should be made by public auction, and to the highest bidder, who should give adequate security, and that it was further provided, in said act of 1857, that any officer of the city government, who should willfully violate or evade any of the provisions of the said charter, shall be deemed guilty of a misdemeanor. That on the 21st of October, 1857, Wood was mayor, and the other defendants aldermen and councilmen of said city, and officers of the city government; and that they, disregarding their duty, and with intent to violate and evade the provisions of said charter, willfully and unlawfully did violate and evade the said charter, by voting for and in passing a resolution, in due form of law, directing the comptroller to lease to the Roman Catholic Orphan Asylum certain real estate belonging to the corporation, for a period longer than ten years—to wit, for so long a time as the same should be occupied for the use of the said asylum, without causing any such lease of the said property to be put up at public auction, to be let or leased to the highest bidder. It will be seen by this abstract of the indictment, that it is not averred that any lease has ever been in fact executed or delivered by the comptroller, nor that the asylum has acquired any right, title or interest in or to the said lands. If it shall appear that these averments are, or either of them is, a necessary ingredient in the offence charged in the second count, it follows that the omission vitiates the count.

The 41st section already referred to, declares that no lease thereafter given shall be for a longer period than ten years; and, also, that all leases shall be made by public auction, and to the highest bidder, who will give adequate security. It is the violation of these provisions, with others, that is declared to be a misdemeanor. It is, then, a misdemeanor to make a lease for a longer term than ten years; and it is also a like offence to make any lease, whether for less or more than ten years, except by public auction, and to the highest bidder," &c.

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If the second count alleged the making of a lease for a longer term than ten years, and also, that it was made without being put up at public auction, &c., it would contain the description of two distinct and independent violations of the 41st section of the charter, and consequently two misdemeanors; a count thus framed would be fatally defective. But it will be seen that it is not alleged in this count that any lease has been made; the averment is, that the *defendants did violate and evade the provisions of said act by voting for, and passing a resolution in due form, directing the comptroller to lease to the asylum.* By the statute, the offence is the giving of the lease; the offence in the indictment is the voting for a resolution authorizing the proper officer to make a lease.

Penal statutes are to be strictly construed; in other words, the offence with which the accused is charged must be brought plainly within the letter and spirit of the statute. Can it require argument to demonstrate that the passing by the common council, with the approval of the mayor, of a resolution that a lease be executed by the comptroller, is not the giving of a lease? It is said by the counsel for the People, that all the defendants could do toward giving the lease, was to pass the resolution in question. That may be, but in order to convict them under the statute, the lease must be made. The making is the very essence of the offence, and if no lease has been made, then the statute has not been violated, and of course no offence committed. The counsel for the People suggested, also, that this resolution, approved by the mayor, was a lease, within the principle decided by the Supreme Court in this district, in the case of Lowber. It was held in that case, that in case of a resolution by the common council to purchase certain real estate of Lowber, the comptroller, whose duty it was to complete the purchase, but which he refused to do, had no discretion whether he would obey the order of the common council. I have the opinion of the learned justice in this case of Lowber before me. In it he says: "The heads of departments do not hold their places independent of the legislation of the common council, *and when such legislation is not in violation of*

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law, they have no right or power to refuse obedience to such legislation, because they may deem it unwise or improvident. On the contrary, they are only in the legitimate discharge of their duties when they comply with the legislative directions of the common council, *not passed in violation of law.*" I fully concur with the learned justice in these views. If sound, they dispose of the position assumed by the counsel for the People. The comptroller is, according to the opinion in the case of Lowber, required to obey those resolutions and ordinances of the common council which they have authority to pass. But he is not bound to obey those which they have not authority to pass. If, then, the defendants could not make a lease for more than ten years, and if the resolution required the comptroller to make a lease for a longer term, he was not bound to obey, nor could the court compel him to execute such a lease. If the comptroller had executed the lease in obedience to the resolution in question, I entertain no doubt, but he would have been liable to indictment for a misdemeanor, and that the offence of the defendants would thus have been perfected. How can this resolution be called a lease, when it was not intended as such, but contemplated an instrument thereafter to be drawn which should be a lease. Again, by the city charter the common council and mayor could not make a lease; that power is expressly conferred on the comptroller, and the resolution conforms to the charter, and leaves the execution of the lease to the officer who alone could rightfully make it. Does this resolution partake in any respect of the form or nature of a lease? Does the resolution create a term in favor of the asylum? Does not it give possession or the right of possession—does it contain any agreement to let or pay rent—or any condition on which the estate, if there was one, should terminate? Could the corporation maintain an action on this resolution for the rent? In short, could either the asylum on the one side, or the corporation on the other, maintain any action or proceeding on this resolution, as and being a lease of these premises in question. It seems to me not. And if not, then

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no lease for a term of more than ten years has been granted, and of course no offence committed.

If I am right in holding that the actual giving of a lease is necessary to render the defendants liable under the clause of section 41 above referred to, it is just as essential to render - them liable under the clause constituting the other offence of making leases otherwise than by public auction.

I must hold, therefore, that the second count of this indictment is bad, for the reason that it does not allege or show that any offence has been committed by the defendants, or either of them, within the true intent and meaning of sections 40 and 41 of the act of 1857.

It only remains to inquire whether the first count charges an offence for which the defendants can be put upon their trial. This count is for a conspiracy. It alleges the passing of the act of 1857; that Wood was mayor, and the other defendants aldermen and councilmen of this city; that, disregarding their duty, they did willfully, maliciously and unlawfully conspire, combine, confederate and agree together to violate and evade the provisions of the said act, by certain means which were then and there in themselves criminal, viz.: by willfully, unlawfully and maliciously passing a resolution through the common council, and obtaining the sanction of the mayor thereto, directing the comptroller to execute a lease to the asylum of certain premises described in the said resolution; that the corporation owned the said premises; that those of the defendants who were aldermen willfully, unlawfully and maliciously did vote in favor of, and aid and assist in the passage of such resolution, and did obtain the approval of the board of aldermen to said resolution, and the same was duly certified by the clerk of said board; and the like charge against those of the defendants who were members of the board of councilmen; and that Wood, as mayor, did willfully, maliciously and unlawfully approve of said resolution.

A conspiracy is defined to be a combination of two or more persons to accomplish an illegal object, or a lawful object by illegal means.

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The 2d Revised Statutes (874, § 8), provide that if two or more persons shall conspire to commit any offence, &c., they shall be deemed to be guilty of a misdemeanor. Section 10 provides that no agreement, except to commit arson or burglary, shall be deemed a conspiracy, unless some act under such agreement be done to effect the object thereof, by one or more of the parties to such agreement. Although by the statute an overt act must be averred in order to complete the offence, yet the gist of the offence is the corrupt agreement. The conspiracy charged or intended to be charged in this instrument, is to do an unlawful act. What is the unlawful object which the conspirators in this case are charged with conspiring to attain? The indictment alleges that it was to violate and evade the provisions of the said act (meaning the amended charter of 1857), by certain means which were in themselves criminal, to wit: by passing a resolution through the common council directing the comptroller to execute a lease, &c. The allegation that the statute was to be violated or evaded by means in themselves criminal, cannot help the count, as it is not shown what the means were, and so far as the facts alleged can aid us in determining the character of the means, they seem to be lawful. But what was the object sought to be obtained? The public prosecutor argues that that object was to give a lease for more than ten years, and without putting it up at public auction, &c. But no such object or design is charged. It is said the statute was to be violated by the passage of the resolution. If I have succeeded in showing that the passage of the resolution did not violate the statute, then certainly it was not unlawful. The count does not show by averment that it was the object of the conspiracy to create an illegal term, or to give a lease otherwise than by public auction.

The only other ground on which this count can be sustained, is by treating the allegation that the defendants conspired to violate or evade the act, sufficient without any specifications of the particular section or clause of the act the conspirators designed and agreed to violate.

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The English courts have upheld indictments for conspiracies quite as vague and indefinite as this, as to the statement of the object of the conspiracy. In our own courts a more stringent and, as I think, a more just and sensible doctrine is insisted on, and the public prosecutor is required to state truly and specifically the precise object contemplated by the conspiracy. But as I can find no decision directly on the question, and as it is not entirely free from doubt, I shall hold the count sufficient in form in the respect alluded to.

As I have aimed to dispose of this case on the merits, rather than on mere technical rules of pleading, I will assume, therefore, for the purposes of the case, that conspiring for an unlawful purpose is properly charged in the indictment, and that that unlawful purpose was the violation of the act of 1857, already cited. I have declared my opinion to be that the defendants, by voting for the resolution, were not liable for a misdemeanor, as the statute made the giving the lease, and not voting for the resolution ordering the lease, the violation which is denounced as a misdemeanor. The last clause of the 8th section of the act of 1857, expressly declares that no alderman or councilman shall be questioned in any other place for any speech or vote in either board.

We must give effect to this clause, as well as to the 40th and 41st sections of the same act. In the view which I take of these provisions, there is no conflict between them. The statute not only does not seek to hold the member of the common council responsible for his vote, but expressly exempts him from all accountability therefor, unless it is the result of official corruption. He *is* responsible when he shall have aided in doing an act forbidden by law, and that act, when done, declared to be a misdemeanor.

If I am right in these views, it follows that, although the votes of the defendants may be proved to show an overt act by the conspirators, yet it is not on the principle that the votes thus permitted to be proved are illegal, but as lawful acts done in execution of the conspiracy. Giving, as I think we must do, full force and effect to the exemption from responsibility

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for voting, their votes must be held lawful for all purposes. The public prosecutor cannot, therefore, rely on the defendants' votes for the resolution in question as any evidence of the unlawful confederacy; that must be proved by other and independent evidence.

I am, therefore, of the opinion that the second count of this indictment is insufficient, for the reason that it sets forth no crime or offence.

Second, that the first count is valid in law, and that the defendants must be held to answer said count.

The motion to quash is therefore denied, so far as the first count is concerned.

SUPREME COURT. New York General Term, December, 1858. *Davies, Clerke and Sutherland*, Justices.

THE PEOPLE *v.* JOHN D. MARKS.

The offence of burglary consists of breaking and entering with intent to steal or commit any felony, and the commission of the crime, of which the intent is charged, is not the only evidence by which such intent may be proved. It may be shown by some other fact or circumstance, or by some act or declaration of the prisoner.

Where, in an indictment for burglary with intent to commit larceny, and for the commission of such larceny, the larceny itself is insufficiently charged, the prisoner may still be convicted of the burglary alone, if the evidence is sufficient to establish the intent charged.

On the trial of an indictment for burglary, it is erroneous for the court to charge the jury that the prosecution is not bound to prove the intent affirmatively, though the intent need not be proved by direct or positive evidence, yet the prosecution must affirmatively show facts or circumstances from which it may be inferred.

An indictment for burglary, charging the breaking into a store in which goods are kept for use, sale and deposit, is not sustained by evidence of breaking into an inner room of a building, which was not a store, but a mere business office of the Board of Underwriters, in which were kept merely furniture and articles for their business use.

THIS case came up on *certiorari* to the Court of General Sessions of the Peace in the city and county of New York, where the prisoner had been found guilty by the verdict of a jury.

The facts in the case are sufficiently stated in the opinion of the court.

J. Blunt (District Attorney), for the People.

E. Blankman, for the defendant.

By the Court, SUTHERLAND, J. The prisoner, John D. Marks, was tried at a Court of General Sessions of the Peace, held in and for the city and county of New York, before the Hon. A. D. Russell, City Judge, on an indictment which charged that on the 28th day of June, 1858, at the first ward in the city

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of New York, the said Marks did feloniously and burglariously break into and enter the *store* of the Board of Underwriters there situate, "the same being a building in which divers goods, merchandise and valuable things were then and there kept for use, *sale* and deposit, with intent, the goods, chattels and personal property of the said Board of Underwriters, in the said store then and there being, then and there feloniously and burglariously to steal, take and carry away." And which indictment no doubt was intended further to charge, that the said Marks did then and there steal, take and *carry away* a carpet, six chairs, and various other articles, the value of which are severally stated in the indictment, the property of the Board of Underwriters, in the said store, kept as aforesaid, then and there being. But the words *away, against*, which ought to have followed the word *carry*, having been left out, no doubt by a clerical error in drawing the indictment, the indictment reads, "then and there feloniously and burglariously did steal, take and carry, the form of the statute," &c.

This clerical omission, upon which some stress was laid on the argument, I do not think of any importance in disposing of this case.

By the Revised Statutes, burglary consists of three degrees. The crime for which the prisoner was indicted was burglary in the third degree, as defined by the statute.

By the statute, the breaking and entering "any shop, *store*, booth, tent, warehouse, or other building in which any goods, merchandise or valuable thing shall be kept for use, *sale* or deposit, with intent to steal therein, or to commit any felony," is burglary in the third degree.

The offence is complete by the breaking and entering, with the intent to steal, &c. The actual larceny, although, when it can be proved, the most conclusive evidence that the intent of the breaking and entering was to steal, need not, I presume, be charged in the indictment, and when charged the proof of it is not necessarily the only proof of the intent.

But there must be proof of some fact or circumstance, act or declaration of the prisoner, in addition to the proof of the mere

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breaking and entering, from which the jury can find the intent charged in the indictment.

In this case, the only evidence of the breaking and entering was the testimony of Mary Schmidt, who testified that she saw the prisoner at 6 P. M., come out of an office and lock the door, on first floor (rooms numbered 17, 19 and 21, in No. 49 Wall street), and that he tried the other door; asked if those gentlemen had gone; that he went down stairs and took a key and unlocked No. 16 (the office of the Board of Underwriters); that she then called John Davis, the colored boy; that when he, the prisoner, saw her he walked pretty smart, and Davis followed him; that she locked No. 16 that afternoon; did not see anything in the prisoner's hand; that she saw the prisoner take the keys out of his pocket, *and open the door* of No. 16.

John Davis, the colored boy, testified: That he saw the prisoner in front of the door of No. 50 Wall street; that the witness was sweeping, and the prisoner came out by the door and walked very fast; that the witness followed him to Jauncy Court, and saw him throw two keys away; picked up the keys, and followed him to Broadway and Exchange place, where he was arrested.

James Sylvie, the officer, testified: That he saw the prisoner on the corner of Wall and William streets, on the second floor, in the hall; took him to the Station house; found on his person some pawn tickets and two coats, money, and several counterfeit notes; received the keys from Dorsey, to whom the boy Davis had handed them, and tried them in door of No. 16; they fitted well.

Gerard S. Stagg, business clerk to the Board of Underwriters, testified: That the rooms of the Board of Underwriters, 16 and 18, in 49 Wall street, contained furniture, carpets, tables, chairs and charts, on the 28th day of June, the day on which the prisoner was charged to have committed the burglary.

This is all the evidence I find in the case; and on this evidence, under the charge of the court, the jury found the prisoner guilty.

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I do not find any evidence that the prisoner ever *entered* the door of the room No. 16, or that any of the property found on him had been stolen, and no evidence that anything had been taken, or stolen, or missed from room No. 16.

The Judge, in charging the jury, after stating the offence for which the prisoner was indicted, as defined by the statute, charged as follows:

That before they could convict the defendant as charged, they must be satisfied that a burglary had been committed, and that the defendant entered the premises with the intent to steal or to commit a felony. That the intent must be gathered from all the circumstances of the case, and *that the prosecution was not bound to prove it affirmatively*. That the evidence showed that a burglary had been committed, and if they, the jury, believed that the defendant entered the premises with the intent to steal or commit a felony, then they must convict; otherwise, acquit. That if they had a well founded doubt, as to the guilt of the defendant, they must give him the benefit and acquit.

To this charge the prisoner's counsel excepted.

The charge would certainly appear to be just and fair in the main, and yet, no doubt from inadvertence, I think it contains grave errors, which may have had a very serious effect upon the jury against the prisoner. It was certainly an error to tell the jury, that the prosecution was not bound to prove the intent *affirmatively*, and to charge then positively that the evidence showed that a burglary had been committed. These propositions, however, qualified by other parts of the charge, preceding or following, were wrong, and calculated to mislead the jury, and to prejudice the prisoner.

The intent, it is true, was to be gathered from the circumstances of the case, but the prosecution was bound to prove it affirmatively; that is, to prove facts and circumstances affirmatively, from which the jury could gather the intent, and *the* intent charged in the indictment. If the learned judge had told the jury that the prosecution were not bound to prove the intent positively, the prisoner would have had less cause to complain.

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So the judge was certainly unfortunate in the use of words when he told the jury that the evidence showed that a burglary had been committed. The evidence may have shown that there had been a breaking into, but it did not show a burglary, unless it showed the breaking into with intent to steal, &c.

The intent is a part of the definition of burglary. The very question for the jury was, whether a burglary had been committed. I think the exception to the charge was well taken, and that upon that ground alone the prisoner should have a new trial.

I am inclined to think, also, that there was a fatal variance between the offence (if any) proved, and the offence charged in the indictment.

The indictment charged the prisoner with breaking into and entering a *store*, in which goods were kept for use, *sale* and deposit. The proof, if it showed a breaking *and entering*, showed a breaking and entering into an inner room of a building in Wall street, which room was not a *store* in which things were kept for use, *sale* and deposit, but a mere business office of the Board of Underwriters, in which were kept merely furniture and articles for their business use.

It will hardly do to say this is mere matter of form, and should be disregarded. It appears to me that it is matter of local description and of statutory definition of the offence, and that the variance was material and could not be disregarded.

Upon the whole, I am of the opinion that there should be a new trial.

Conviction reversed and new trial ordered.

NEW YORK OYER AND TERMINER. January, 1859. Before *Mullin*,
one of the Justices of the Supreme Court.

THE PEOPLE *v.* JOSEPH R. TAYLOR.

The non-payment, by the collector of assessments of the city of New York, to the chamberlain of said city, within the time required by the ordinances of the common council, of the money collected by him on tax warrants issued by the city authorities, is not a "fraud upon the city" within the meaning of section 40 of the amended charter of said city, passed April 14, 1857, by which the committing of a fraud upon the city is declared to be a misdemeanor.

THIS was a motion to quash an indictment, on the ground fully set forth in the opinion of the court.

John W. Edmonds, for the defendant, made the following points:

Point I. This being an indictment for a statutory offence, it should contain specific averments of every fact necessary to bring the alleged offence within the statute.

II. The statute under which this indictment was found was the amended charter of 1857, and it created a misdemeanor for four causes:

1. Evading or violating the charter; or,
2. Committing any fraud on the city; or,
3. Converting any of the public property to private use; or,
4. Permitting such conversion by others.

This indictment was for the second ground, viz.: fraud upon the city. All the allegation was, that defendant received \$15,500 of his deputy collector, and did not pay it over. Was this necessarily "a fraud on the city?"

The money might be retained by virtue of an injunction, or for defendant's fees, &c., &c. The facts stated not being of necessity a fraud, the indictment is defective in not averring in what the fraud consisted.

III. The facts stated, if proved, did not show any fraud upon the city, for the money alleged to have been paid to defendant did not belong to the city, and therefore the city could

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not be defrauded. It belonged to the owners of the property taken for the park, and if any one was defrauded it was they and not the city.

IV. There could be no fraud without falsehood, and there was no allegation here of either *expressio falsi* or *suppressio veri*. The non-payment of the money did not of itself constitute fraud.

V. It was not averred that the money was paid to defendant as a public officer, nor that it was his duty as such to receive or pay it.

VI. There was no statute requiring defendant to pay to the chamberlain. It was prescribed by ordinance only, and to sustain this indictment would make every violation of an ordinance an indictable offence.

VII. The ordinance required the collector, on each Tuesday, to render an account to the comptroller of his receipts, and "thereupon" to pay to the chamberlain; therefore, if this indictment should lie, it would be an indictable offence to be one day behind.

VIII. The averment that defendant was an officer of the city, was defective.

IX. It was not averred that any legal assessment had been imposed, which defendant had a right to collect. *Non constat*, the money would have been illegally collected and the defendant personally liable if he had paid it over.

X. The indictment averred that it was defendant's duty to pay over the money, &c. This was a conclusion of law arising from facts, and the defect was in not setting forth the facts whence that conclusion flows.

XI. An act done in the exercise of a supposed legal right, could not be a felony, though contrary to a statute. And it was not enough to allege matter which makes it probable that an offence has been committed. The act of retaining the money by the defendant was not necessarily illegal. It was just as probable that he had a right to retain it as that he had not.

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XII. In an indictment for an offence created by statute, the indictment must show what offence was committed by positive averment. It was not enough that it appear by inference.

XIII. Therefore the indictment should be quashed, and courts could quash an indictment, 1. If from facts stated it appeared that no indictable offence had been committed. 2. When the offence imputed was not of a public nature, and a material averment was wanting. 3. And where there was a gross deficiency in the formal requisites of an indictment.

John McKeon and James R. Whiting, for the People.

MULLIN, J. The defendant is indicted by the grand jury, under the 40th section of the amended charter of the city of New York, passed April 14, 1857.

That section is as follows: "Any officer of the city government, or person employed in its service, who shall willfully violate or evade any of the provisions of this charter, or *commit any fraud upon the city*, or convert any of the public property to his own use, or knowingly permit any other person to so convert it, shall be deemed guilty of a misdemeanor," &c., &c. The particular clause of the section which the defendant is charged with violating, is that which declares it a misdemeanor to "*commit any fraud on the city*." The fraud alleged is the non-payment by the defendant, to the chamberlain of the city, of the taxes collected by him on warrants issued by the city authorities to the defendant as collector of assessments in said city, within the time required by the ordinances of the common council.

There are numerous objections made to the indictment by the defendant's counsel, several of which I think are well taken.

I propose to examine but a single one, which is, that the indictment does not allege or show that any fraud upon the city has been committed. This objection goes to the merits, and, if well taken, no amendment can cure it, and thus the delay and

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trouble incident to an attempt to remodel the present bill, to obviate mere formal objections, will be avoided.

The Legislature has not given any definition of the term "*fraud*," used in this statute, and we are left, therefore, to ascertain its meaning by the well established definition of the term by the courts and by approved writers on the law, at the time of the passage of the act in question.

By a distinguished writer on the civil law, fraud was defined to be "any conniving, deception or artifice, used to circumvent, cheat, or deceive another." This definition is approved by Judge Story in his *Equity Jurisprudence* (vol. 1, §§ 186, 187), as being sufficiently descriptive of positive actual fraud, when there is an intention to commit a cheat or deceit upon another, to his injury. But he says it does not embrace that large class of frauds recognized in equity as implied or constructive frauds.

Mr. Jeremy, in his *Equity Jurisprudence* (B. 3, p. 2, 358), defines fraud to be "a device, by means of which one party has taken an unconscientious advantage of the other."

Judge Willard, in his *Equity Jurisprudence* (p. 147), says "Fraud has been defined to be any kind of artifice by which another is deceived." Hence, he says, "All surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud."

Can it be said that the acts or omissions of the defendant charged in this indictment, constitute fraud within either of the definitions of that term above given? It is impossible to separate deceit or artifice from fraud; it is of the very essence of the fraud. That ingredient is totally wanting in this case. It was doubtless competent for the Legislature to declare that the omission by a public officer to pay over money collected by him in his official capacity, was a fraud upon the person or corporation entitled to receive it. But until fraud is thus defined, no indictment for such an offence as a fraud can be maintained.

I have been referred to the definition of fraud as laid down in Bacon's Abridgement, title Fraud. It is there defined thus: "Fraud is the act by which one person, unlawfully, designedly

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and knowingly, appropriates to his own use the property of another without a criminal intent." If this is the true meaning of the word, it embraces the acts or omissions charged on the defendant in this indictment. With all deference, I think this definition omits all the essential ingredients of fraud, and embraces a multitude of acts which have never been supposed to be fraudulent.

Within the definition thus laid down, comes every forcible and known unlawful seizure and conversion of property, embracing all cases of trespass, case, trover and replevin, in which the guilty party was acting illegally and with knowledge that the property taken was that of another. If A goes at midday into his neighbor's field, and forcibly seizes and carries off such neighbor's horse, knowing that the latter was the lawful owner, A may, under the definition, be indicted for the fraud wherever fraud is indictable. The litigation of the country would be transferred from the civil to the criminal courts wherever this definition of fraud was adopted. I will not say that in no case will acts such as are embraced in this definition, constitute fraud; but I do say that such acts, standing alone, do not come within the meaning of the term fraud, as understood by the courts of this country or of England.

As every violation or evasion of the charter is declared to be a misdemeanor, if the duty of paying over is imposed upon the defendant by the charter, there is no necessity for resorting to any forced construction of terms to make the accused responsible. If the duty is not imposed by the charter, then the omission to perform it is not a criminal offence, and the city must resort to the same civil remedy that every individual in the State is compelled to adopt when his servant or agent embezzles his property, or neglects or refuses to pay over moneys which he may have received for his principal.

For these reasons I am constrained to grant the motion to quash this indictment. If I entertained any doubt as to its sufficiency, I would leave the defendant to his motion in arrest of judgment; but I cannot discover any principle upon which the indictment can be sustained, without a total abandonment

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of those rules of criminal pleading, the observance of which is essential to the protection of the citizen, whether guilty or innocent of the crime of which he stands accused.

It is said that any pleading is sufficient that informs the accused of the offence with which he is charged. This is unquestionably the very end and object of all pleading, and if this general rule is rightly understood and applied it is unobjectionable. The use which is sought to be made of the rule at this day, in criminal as well as civil cases, is to justify the abandonment of all form and all certainty in pleading, and, instead of inquiring whether an offence or cause of action is contained in the indictment in the one case, or complaint in the other, the inquiry demanded by the rule, as now understood, is, "does it inform the party of the charge or claim made against him." The rule, as it should be applied, requires that the offence or cause of action be described with such precision and accuracy as to distinguish it from all other offences and causes of action, and that by such description the other party may know with what he is charged. The test, then, is not how loose and imperfect a pleading may be, but how clearly and distinctly the case intended to be made by it is stated. The common law required great accuracy in both civil and criminal pleading, not with a view of oppressing the parties, but of protecting them from the evils resulting from loose and inartificial pleadings; to require the pleader to so describe the offence in the indictment that the accused might be shielded from a second prosecution for the same offence. This wholesome and necessary rule must be enforced, or all system and symmetry in pleading will be lost, and the accused will be no longer safe from repeated annoyances on the same accusation.

The motion to quash the indictment is granted.

UNITED STATES CIRCUIT COURT. Southern District of New York.
Before Judge Hall. January, 1859.

THE UNITED STATES v. JOHN MULVANEY.

An indictment charging the opening of a letter, which had been in the custody of a mail carrier, before it had been delivered to the person to whom it was directed, with a design to obstruct the correspondence of another, &c., is not sustained by proof that the defendant opened a letter which had been left with him at his residence by the mail carrier, and which was directed to another person to the care of the defendant, at the number of the house occupied by the defendant, it appearing that the defendant not only used no artifice to obtain possession of the letter, but that he in fact objected to receiving it.

Held, also, that there being no evidence of the *corpus delicti*, except the confessions of the defendant, the defendant ought to be acquitted on that ground.

Form of an indictment in the United States Court for opening a letter, which had been in the custody of a mail carrier, before it was delivered to the person to whom it was directed.

THE defendant was brought to trial upon an indictment which was in the words and figures following:

"Southern District of New York, in the Second Circuit.

"At a stated term of the Circuit Court of the United States of America, for the southern district of New York in the second circuit, begun and held at the city of New York, within and for the district and circuit aforesaid, on the last Monday of February, in the year of our Lord one thousand eight hundred and fifty-nine, and continued by adjournment to and including the third day of March in the same year.

"Southern District of New York, ss:

"The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present: That John Mulvaney, late of the city and county of New York, in the district and circuit aforesaid, laborer, heretofore, to wit: on the seventeenth day of January, in the year of our Lord, one thousand eight hundred and fifty-nine, at the city of New York, in the southern district aforesaid, and within

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the jurisdiction of this court, did open a letter which had been in custody of a mail carrier, before it had been delivered to the person to whom it was directed, with a design to obstruct the correspondence, to pry into another's business and secrets, against the peace of the United States and their dignity, and against the form of the statute of the said United States, in such case made and provided.

Second Count.

"And the jurors aforesaid, on their oath aforesaid, do further present: That John Mulvaney, late of the city and county of New York, in the district and circuit aforesaid, laborer, heretofore, to wit: on the seventeenth day of January, in the year eighteen hundred and fifty-nine, at New York, in the district and circuit aforesaid, and within the jurisdiction of this court, did destroy a certain letter, which had been in custody of a mail carrier, before it had been delivered to the person to whom it was directed, with a design to obstruct the correspondence, to pry into another's business and secrets, against the peace of the United States and their dignity, and against the form of the statute of the said United States, in such case made and provided.

"THEODORE SEDGWICK, *U. S. District Attorney.*"

The defendant pleaded not guilty.

The government proved, that on or about the seventeenth day of January, 1859, a city mail carrier left with defendant, at his place of business (82 Catharine street), a letter directed to "John Stewart, care of John Mulvaney, 82 Catharine street, New York city;" that defendant at first objected to receiving it, but took it, and said he would see that it was delivered to the person to whom it was directed. Stewart testified that the letter was never delivered to him. Several witnesses testified that defendant, upon being asked whether he had received the letter, at first denied it, but afterwards admitted that he had received the letter, opened and read it, and then burnt it.

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Henry L. Clinton, for the defendant, contended that, inasmuch as the letter was delivered by the mail carrier, at the place to which it was directed, defendant having resorted to no fraud or artifice to get possession of it, the letter had passed out of the jurisdiction of the United States. Mr. C. also contended that there must be proof of the *corpus delicti* aside from the confessions of defendant; and as there was no testimony showing either the opening or destruction of the letter, except defendant's admissions, on this ground the jury should acquit. On this point, counsel cited *People v. Hennessey* (15 *Wend.*, 147.)

After hearing *Mr. Dwight*, Assistant U. S. District Attorney, the court sustained both points taken by the defendant's counsel, and directed an acquittal.

Verdict, not guilty.

SUPREME COURT. At Chambers. New York, January, 1859. Before *Sutherland*, Justice.

THE PEOPLE v. HENRY RHONER.

A warrant of commitment is irregular in not stating or showing on its face that the justice issuing it had determined that there was probable cause to believe the prisoner guilty of the offence with which he stood charged.

Bank notes wholly printed or engraved, are the subjects of forgery, and counterfeits of them, wholly printed or engraved, made with the intent to defraud, are forgeries within the 83d section of 2 R. S., 673.

The prisoner was charged, under section 33 of 2 R. S., 673, with forging notes of the "Austrian National Bank," and under section 36 of 2 R. S., 674, with having such forged notes in his possession, with intent to utter them. It appeared that the notes of the "Austrian National Bank," including the signature of the "cashier director," were wholly printed or struck from an engraved plate, and the counterfeits found in the possession of the prisoner were evidently made in a similar manner: *Held*, that such bank notes were covered by the word "instrument," in section 33 referred to, though no part of them was written, and that the offence of counterfeiting them was forgery under the statute.

THIS case came before Mr. Justice *Sutherland*, on *habeas corpus*, at chambers.

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At the same time that the writ of *habeas corpus* was issued to the warden of the city prison to bring up the body of the prisoner, Henry Rhoner, writs of *certiorari* were issued to James H. Welsh, the police justice who committed the prisoner, and to Joseph Blunt, Esq., the district attorney of the city and county of New York, commanding them severally to certify the day and the cause of the imprisonment of Rhoner.

Justice Welsh returned to the *certiorari* directed to him, that he took a certain complaint, under oath, against Rhoner, and certain other testimony, which he reduced to writing; that Rhoner waived a further examination of the case, and that he thereupon made his warrant of commitment to the warden of the city prison, committing him under the complaint, and that, as required by law, he had returned to the court of General Sessions all the testimony taken before him.

To the *certiorari* directed to him, Mr. Blunt, the district attorney, returned the complaint and depositions taken before Justice Welsh, and returned by him to the Court of Sessions.

To the writ of *habeas corpus*, the warden of the city prison made return by producing the body of the prisoner, and annexing to the writ, and certifying as the cause, of detention, a copy of the warrant of commitment of Justice Welsh, from which it appeared that the prisoner was charged before Justice Welsh, on the oath of Joseph Keefe, with having, on the 19th day of November, 1858, at the city of New York, in his possession, twenty-two bank notes, purporting to be each one hundred guilder notes, of the "Austrian National Bank," with the knowledge that the same were forged and counterfeited notes on said bank, with intent to defraud.

The prisoner answered the return to the *habeas corpus*, by alleging, substantially, that the only testimony before Justice Welsh, upon which he issued the warrant of commitment, was that contained in the complaint and depositions so returned by the district attorney to the *certiorari* issued to him; and that such complaint and depositions do not show that the prisoner had committed or been guilty of any criminal offence, to

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authorize or justify the issuing of the warrant of commitment.

Henry L. Clinton and F. S. Stallnecht, for the prisoner.

J. Laocque, J. R. Whiting and Joseph Blunt (District Attorney), for the People.

SUTHERLAND, J. Without passing upon the question of the regularity of the writs of *certiorari* and *habeas corpus* issuing at the same time, or of the writs of *certiorari* issuing to the district attorney and to Justice Welsh, in this case, inasmuch as the complaint and depositions upon which the prisoner was committed, have been actually returned by the district attorney, and are before me, and the prisoner asks to make them a part of his answer to the return to the *habeas corpus*, I shall consider the complaint and testimony before the committing magistrate properly before me, and look into them to see whether they contain sufficient to authorize the commitment and imprisonment of the prisoner, provided I am authorized in this case to go behind the commitment and look into the depositions before Justice Welsh.

Without examining or deciding the question so elaborately argued before me in this matter, whether, if the commitment were regular on its face, I could go behind it and look into the depositions and review the decision or determination of Justice Welsh upon the testimony, I am of the opinion that the commitment is not regular; and that I am authorized, and that it is my duty in this case, to look into the depositions before the justice to see whether the prisoner's commitment was authorized and his detention is legal.

Without adverting to any other particular, I think the commitment is irregular in not stating or showing on its face that the justice had determined that there was probable cause to believe the prisoner guilty of the offence with which he stood charged. I think the commitment should show on its face this

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determination or judgment of the committing magistrate, and that in the absence of it I ought to look into the testimony before him to see whether in fact there was or is probable cause to believe the prisoner guilty of the criminal offence with which he was charged, or of any criminal offence.

I have accordingly looked into the depositions before the justice, upon which the prisoner was committed.

I find that the prisoner and two others, John Kaegi and John Sturzenegger, were arrested and brought before the justice, charged with passing and having in their possession, with intent to pass, a large number of forged bank notes of the Bank of Austria, and without referring to the particulars or details of the depositions, it is sufficient to say, if the instruments or bank notes so alleged to be forged, were forged, or could be the subjects of forgery, within the statutory definitions of that crime contained in the Revised Statutes, that then these depositions are abundantly sufficient to show that there is probable cause to believe that the three prisoners were guilty not only of passing certain of these forged bank notes, knowing them to be forged, and of having others of them in their possession with intention to pass them, but of forging them.

Several of the alleged forged notes, found in the trunk of Rohner and on the persons of the other two prisoners, are annexed to depositions. Of those found in the trunk of Rohner, some of them appear not to be complete or entirely filled up, and every part of such as appear to be complete or entirely filled up, *including the signature of the cashier or "cashier director," is evidently a print or impression from an engraved plate.*

Not only are the vignette, the scroll at the top, the heads at the ends, and the Austrian coat of arms at the bottom of the bill, impressions from an engraved plate or plates, but the entire instrument, including the signature, is evidently an engraving or an impression from plate or plates.

The alleged forged notes are in the German language, and the following is a translation of one of them, made and handed

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to me by one of the counsel for the prisoner, on the hearing of this matter :

" 100 Hundred Guilders. 100 "

"The privileged Austrian National Bank pays to the Bearer against this Draft, Hundred Guilders, Silver Currency, according to the conventional value.

"For the privileged Austrian National Bank,

"H. WEITTENHILLER,

" *Cashier Director.*

"Vienna, the 1 January, 1847."

It appears from the depositions taken before the justice in this matter, that there is and was a bank or corporation called the Austrian National Bank, incorporated and authorized by the laws of the empire of Austria, to issue circulating notes; and that the alleged forged bank notes, so found in the possession of the prisoner, were false, forged and counterfeit, and made in the form and similitude of the genuine bank notes or bills issued by the said "Austrian National Bank."

It does not appear from the depositions before the justice whether the signature to the genuine bank notes of the said bank is or is not engraved; but the counsel for the prisoner, on the hearing of this matter before me, offered to prove that every part of the genuine bank notes or issues of the said bank, including the signature, was and is a print or impression from an engraved plate; and in disposing of the only ground or point on which the counsel for the prisoner insist that the depositions do not show that the prisoner has been guilty of any crime, and move for his discharge. I shall assume that every part of the genuine, as well as of the alleged forged notes, including the signatures, is a print or impression from an engraved plate. Being so, the counsel for the prisoner insist that these alleged forged notes cannot be forgeries, or the genuine notes the subjects of forgery, because they are not *writings*; that at common law, as well as under the Revised Statutes, *writings*, or *written* instruments only, are the subjects of forgery.

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Having examined this question with some care, I have no hesitation in expressing the opinion that the counsel for the prisoner are clearly mistaken in their interpretation of the provisions of the Revised Statutes in relation to forgery.

By section 33 (2 *R. S.*, 673), every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit "any *instrument* or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged or diminished, or by which any rights or property whatever shall be or purport to be transferred, conveyed, discharged, diminished, or in any manner affected, the punishment of which is not hereinbefore prescribed, by which false making, forging, &c., *any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof shall be adjudged guilty of forgery in the third degree.*"

The revisers, in their note to this section, after stating that the first section of the old statute (1 *R. L.*, 404), contained an enumeration of a great number of *instruments* specifically described as the subjects of forgery, and that the same practice had prevailed in England of enumerating particular instruments, by enacting new statutes to reach new cases as they arose, until they amounted to 403, say that section 33 had been prepared, "to avoid cavil, to reach every case of forgery that has ever been committed, or that ever can be committed, and to afford a definite and distinct rule."

By section 36 (2 *R. S.*, 674), "every person who shall have in his possession any forged, altered or counterfeit negotiable note, bill, draft, or other evidence of debt, issued, or purporting to have been issued, by any corporation or company duly authorized for that purpose by the laws of the United States, or of this State, or of any other State, government or country, the *forgery of which* is hereinbefore declared to be punishable, knowing the same to be forged, &c., with intention to utter the same as true or false, with intent to injure or defraud, &c., shall, upon conviction, be subject to the punishment herein prescribed for forgery in the second degree."

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At common law and by statute, the gist of the crime of forgery is fraud. At common law, the crime of forgery was defined to be "the fraudulent making or alteration of a writing to the prejudice of another man's rights." (4 *Blac. Com.*, 247.)

As the wants of civilization and commercial necessity established paper credit, and from time to time called into use new instruments in writing, statutes were from time to time passed, punishing, with severer penalties, the forging of such instruments.

Increased facilities and cheapness in the use of type, has, in our day, in a great measure, substituted printing for writing, and now printed instruments, and instruments partly printed and partly written, are quite as common as instruments wholly written.

The fraudulent intent with which an instrument is forged, or with which a forged instrument is possessed, being the very gist and essence of the crime, without which the counterfeiting might be nothing more than innocent amusement, it is very clear, without reference to statutory definitions, that the making of a printed or engraved instrument calculated to deceive and defraud, with intent to deceive and defraud, might be just as much forgery as the making of a written instrument with the same intent. The crime depends on the intent, and the intent is to be inferred from and depends on facts and circumstances.

If the prisoner Rhoner had caused to be printed or written an ordinary negotiable promissory note, and had with ordinary printing type impressed the name of "John Smith" upon it as a signature, or in the place of a signature, it would have been difficult, if not absurd, to believe that he had forged the note, for individuals do not *print* their names to their notes, but write them; and therefore it would have been difficult to believe that he could have defrauded any one with the note, by making them believe that it was the note of any one of the "John Smiths" in the city of New York.

A person may be guilty of forgery in writing his own name to an instrument, if done with intent to defraud by representing himself to be a different person of that name. (4 *T. R.*, 28.)

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By statute (2 R. S., 675, § 47) and by the common law, a person may be guilty of forgery by affixing the pretended signature of a *fictitious* person to an instrument.

It is not necessary in an indictment for forging an instrument, to allege that the instrument or its pretended signature was or is in writing, or whether they are or were printed or written, provided the whole instrument is set out in the indictment (*The People v. Rynders*, 12 Wend., 431.)

The crime does not consist in making a false instrument, or false signature to an instrument, in the similitude of a real instrument or signature. Such similitude is only to be presumed to have been intended as the means of accomplishing the fraud, and is used as evidence of the intention to defraud.

Corporations are immaterial creatures of the law, and, strictly speaking, can have no signature, but they can execute instruments by their corporate seal, or by the signatures of any one or more of their officers, under their by-laws and regulations. I do not see why a bank corporation, authorized to issue bank notes to circulate as money, unless prevented by the law which created it, should not, by its by-laws, provide that every part of its notes to be issued should be printed or engraved, including the signatures of the president and cashier; and certainly such entirely printed or engraved notes, if thus actually issued by the bank, would be good and valid in the hands of the holder against the bank, and I do not see why they would not be the subjects of forgery within section 38 of the Revised Statutes above mentioned.

No man has the right to use the name of another without his consent, either in print or in writing, as a signature to an effective instrument, or as a trade mark. Whether such unauthorized use of another's name as a signature is forgery, depends upon the intent with which it is used.

If every part of the genuine notes of the "Austrian National Bank" is printed, or an impression from an engraved plate, then the forger would most likely print or impress from an engraved plate every part of his counterfeits of such notes; but if the signatures to the genuine notes were written, I do not

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see why counterfeits of them with engraved signatures, if from their similitude calculated to deceive and defraud, and made, printed or impressed with the intention to deceive and defraud, would not be forgeries, and the making of them forgery, within the statute.

It would certainly have been extraordinary if the revisers, with the declared intention of embracing within the definition of section 33 above referred to, every imaginable instrument which could be the subject of forgery, had omitted bank notes entirely printed or engraved as the genuine notes of the Austrian Bank are assumed to be, or forged notes wholly printed or engraved like those found on the person of the prisoner. I think they are not omitted; and as far as it relates to the nature and character of the instrument as the subject of forgery, they are within sections 33 and 36 of the article of the Revised Statutes concerning forgery, above referred to; and as it would appear, that among the impressions found in the trunk of the prisoner, some were not complete or entirely filled up, perhaps such imperfect impressions are within sub. 8 of section 30 of the same article.

I doubt whether the prisoner's counsel would ever have raised the question which has been raised in this matter, had it not been for section 45 of the same article, defining the words "writing" and "written instrument" as used in the article. But I think the words "*instrument*" and "*writing*" are not used in section 33 as synonyms; and that section 45 intends to define the words "writing" and "*written instrument*," and not the word "*instrument*," as used in the article alone and unconnected with the word "written."

The words of section 33 are: "Any instrument *or* writing, being or purporting to be," &c.

I think the word "*instrument*" includes not only "written instruments," and "writings," as defined by section 45, but also engraved or printed instruments, being or purporting to be the act of another; indeed, all and every kind of instrument by the forging of which any person "may be affected, bound or in any way injured in his person or property."

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I do not see why an engraved or printed instrument, or an engraved or printed name, affixed to an instrument by a person, is not his act, and may not purport to be the act of another.

If a person affixes his name to an instrument, with the purpose of making it effective as a signature, I do not see why it is not his instrument, and effective as against him, whether he so affixes his name with type, an engraved plate, a style, or pen.

I think the prisoner's case is clearly within the statute, and that the writ of *habeas corpus* must be discharged, and he be remitted back to the city prison.

SUPREME COURT. Chenango General Term, May, 1859. *Mason, Balcom and Campbell*, Justices.

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A communication made to an attorney at law, by a person seeking professional advice or assistance to enable him to forge a contract, is not privileged, and the attorney, when called as a witness, can be required to disclose it.

It is competent to ask a witness, on his cross-examination, with a view to affect his credibility if affirmatively answered, whether he had not been guilty of adultery, and had a venereal disease since his marriage. If the facts thus inquired into are wholly collateral to the issue in the case, the witness may refuse to answer such questions, and no inference unfavorable to the character of such witness can be drawn from such refusal.

Where the prisoner was tried on a charge of having forged the name of W. B. to a note and contract, dated 16th or 17th of April, 1855, and it appeared that at such dates W. B. was confined to his bed by sickness, and that he died on the 20th of that month, and that he had given up all hopes of recovery as early as the 13th of the same month, it was held to be competent for the prisoner to prove, that on the 18th of that month W. B. stated to the witness that he had signed the note and contract in question.

On reversing a judgment of the Oyer and Terminer, by which the prisoner was sentenced to imprisonment in the State Prison, and ordering a new trial therein, the Supreme Court further ordered that the prisoner should appear at the next Court of Oyer and Terminer, to be held in the county in which he had been convicted, to stand trial on the indictment, and not depart the court without its leave, and abide its orders and judgment.

The prisoner was tried, at the Delaware Oyer and Terminer, in August, 1858, for forging and uttering, as true, a note and contract, which were in the words and figures following, to wit:

“KORTRIGHT, April 17, 1855.

“Thirty days from date, for value received, I promise to pay James Blakeley, or bearer, one thousand dollars, with use.

“WILLIAM BLAKELEY.”

“KORTRIGHT, April 16, 1855.

“I hereby acknowledge that the receipt given to me by my brother, James Blakeley, thirty-two years ago, in full of all notes, book accounts, actions, and causes of action, either in

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law or equity, to his full satisfaction, was obtained from him by fraud and through fear of bodily harm; and I further acknowledge that the judgment then rendered in his favor for three hundred and twenty-five dollars was just, and that I always intended to pay the same, but still have neglected so to do. Said judgment, principal and interest is not included in the receipt executed by the said James Blakeley to me, on or about the 12th day of April, 1855, nor in any other receipt ever before executed by him to me, and the whole amount of said judgment, principal and interest still remains due and unpaid. Now, therefore, in consideration of the premises, I hereby agree and promise to pay the said James Blakeley the sum of three hundred and twenty-five dollars, with the interest that may have accrued on the same from the 16th day of April, 1823, by the 1st day of June, if I recover from this sickness; if not, I desire that the same be paid out of my estate, as soon as possible, by my executors.

"WILLIAM BLAKELEY."

It was proved that William Blakeley was a brother of the prisoner, and that he had resided many years in Kortright, in the county of Delaware. He died there on the 20th day of April, 1855. He lost all hope of living as early as the 13th day of that month.

William G. Blakeley, a witness for the People, who was a son of the deceased, gave evidence that tended to show the prisoner was guilty of the crime for which he was tried. On his cross-examination, he testified as follows, namely: "I am 37 years of age; I left my father's fifteen years ago; I was married in 1846; commenced keeping house in 1847; I kept house two or three years; after that I separated; I have not since cohabited with my wife."

Question by the prisoner's counsel: Have you had the venereal disease since you were married?

This question the court overruled, and decided it was not proper; and counsel for the prisoner duly excepted.

The prisoner's counsel then asked the witness if he had not, since he was married, had connection with other women than

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his wife; which question the court overruled, and decided that the same was incompetent; to which decision the prisoner's counsel excepted.

The prisoner's counsel then asked the witness whether he had not, since he was married, had the pox; which question the court decided was not proper, and overruled the same; to which decision the prisoner's counsel excepted.

The counsel for the prisoner offered to prove by the witness that he had connection, since he was married, with other females than his wife, that he had contracted a venereal disease, and had the pox, in order to show that he had led a vicious and dissolute life; but the court decided that the said testimony so offered, was illegal and incompetent. To which decision the prisoner's counsel excepted.

Sheldon A. Givens, a witness for the People, testified as follows: I know James Blakeley; about five weeks after I heard of the death of William Blakeley, and about the 25th of May, 1855, he came to me in a lot, where I was engaged, and said he wanted to talk with me some when alone, where none could hear; I went with him to a dwelling house." The witness then testified that he was then an attorney and counsellor at law of the Supreme Court, practising at Harpersfield, and that he had been, previous to this, counsel for the defendant.

The counsel for the prisoner objected to any proof of what the prisoner then and there said to the witness, upon the ground that it was privileged; but the court overruled the objection, and the prisoner's counsel excepted.

The witness then further testified: "The prisoner wished me to draw a paper that would have the effect of reviving or keeping alive a judgment. He said 25 years before, he obtained judgment against William Blakeley, before Zacharias Smith, Daniel Little and some one else, and he gave the amount quite large. He said William made him surrender the judgment without paying for it, and he wanted I should draw a paper that would have the effect to revive and keep alive that judgment. I told him I would have nothing to do with it, and advised him not to. He said I need not be afraid

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of any exposure; he would set down and make a copy himself, so that my handwriting should not go out. He produced a receipt of the 12th of April, from William, a few days before, and pointed out and called my attention to the signature, and said "You know that is genuine." I think I recognize the receipt here in court of April 12th, 1855, signed William Blakeley, as the one he had. I think he showed it to me, and said, "You know that is his handwriting." The prisoner then asked me what was to pay; I said nothing; and he said, there is two dollars—take this—you did some business for me in a horse trade.

On his cross-examination the witness said: "I had done business for James before April, 1855. He asked me what was to pay, and gave me two dollars, and I kept it."

The counsel for the prisoner then asked the court to strike out the testimony of the witness, Givens, upon the ground that the communication was privileged, which the court refused to do, to which refusal the prisoner's counsel excepted.

The prisoner afterwards gave evidence which tended to show that the note and contract, which he was tried for forging, were seen on the 18th or 19th of April, 1855, signed as they appeared to be at the trial.

The prisoner offered to prove that William Blakeley, deceased, admitted to a witness, on the 18th of April, 1855, that he had signed the note and contract in question, but the court, upon the objection of the district attorney, rejected the offer, to which the prisoner's counsel excepted.

The district attorney produced receipts signed by the prisoner, (one of which was dated the 12th day of April, 1855,) which showed that the defendant and the deceased had settled all demands that existed between them prior to the date of such receipts; and he also gave other evidence that tended to show there was no consideration or indebtedness to uphold the note and contract that were alleged to have been forged; and thereafter the prisoner offered to prove admissions made by William Blakeley, deceased, prior to the 16th of April, 1855, to the effect that he owed the prisoner the judgment mentioned

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in the contract, and also that he had collected money of one Leal for the prisoner, which he had never accounted for to the prisoner, and that he intended to pay the prisoner therefor; but upon the objection of the district attorney, the court rejected such offer, and the prisoner's counsel excepted.

Witnesses were examined who were acquainted with the handwriting of the deceased, some of whom testified they were of the opinion the signatures to the note and contract in question were in the handwriting of the deceased; the others thought they were not in his handwriting.

The jury found the prisoner *guilty*, and he was sentenced to imprisonment in the State Prison at Auburn for the term of two years.

The prisoner's counsel made a bill of exceptions, which was duly signed and incorporated into the record of the defendant's conviction.

A writ of error was allowed by one of the justices of this court, with a direction that it operate as a stay of proceedings on the judgment against the prisoner. The writ and a copy of the record were sent to this court by the clerk of Delaware county.

John Grant (District Attorney), for the People.

A. Becker, for the defendant.

By the Court, BALCOM, J. The declarations of the prisoner, proved by the witness Givens, were made thirty-nine days subsequent to the date of the contract in question. When they were proved, no evidence had been given that the contract had been seen by any person prior to the time they were made. Such declarations, therefore, were properly admitted to show that the contract was not in existence when William Blakeley died, nor within thirty-nine days subsequent to its date. But it is claimed by the prisoner's counsel, that because Givens was an attorney of this court, and was being consulted as such by the prisoner when the declarations were made, they were

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privileged, and therefore covered by the seal of professional confidence. This position is clearly untenable. An attorney may testify to any communication made to him to obtain professional advice or assistance, as to the commission of a felony or other crime which is *malum in se*. (*The Bank of Utica v. Mersereau*, 3 Barb. Ch. R., 598.) Nothing, therefore, was privileged that the prisoner said to Givens, if he was seeking professional advice or assistance to enable him to forge the contract; and he was seeking such advice or assistance, if Givens correctly related the conversation between them.

The next question I shall consider, is, whether the prisoner's counsel should have been permitted to ask the witness, William G. Blakeley, on cross-examination, if he had not had a venereal disease and been guilty of adultery subsequent to his marriage. The counsel stated to the court his object in putting the question was to show that the witness "had led a vicious and dissolute life."

Roscoe lays down the rule that "questions with regard to particular facts tending to degrade the witness and affect his character and credit may be put to him on cross-examination, even though irrelevant to the matter in issue; but the party putting them must be satisfied with the answers given by the witness, and cannot call witnesses to prove those answers false. (*Roscoe's Cr. Ev.*, 4th Am. ed., from 3d London ed., 180.) And this rule is too firmly established to be questioned. (See *The People v. Rector*, 19 Wend., 569; *Southard v. Rexford*, 6 Cowen, 254; *Ward v. The People*, 6 Hill, 144; *Barbour's Cr. Tr.*, 399, 400, 401, 402; 4 Wend., 229; *Roscoe's Cr. Ev.*, 307; *Cow. & Hill's Notes*, 419; *Howard v. The City Fire Ins. Co.*, 4 Denio, 502; *Lohman v. The People*, 1 Comst., 379; 1 *Greenl. Ev.*, §§ 456, 460.) Greenleaf states this qualification to the rule, namely: "Questions, the answers to which, though they may disgrace the witness in other respects, yet will not affect the credit due to his testimony," are generally suppressed. (1 *Greenl. Ev.*, § 548.) He places, in this class of questions, one frequently put to the principal female witness, in trials for seduction *per quod servitium amisit*, and on indictments for rape,

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&c., whether she had not previously been criminal with other men, or with some particular person; and he cited a case where, on the trial of a female prisoner for stealing from a person in a house, the prisoner's counsel was not permitted to ask the prosecutor whether, at that house, anything improper passed between him and the prisoner. (1 *Greenl. Ev.*, § 458.) And in a note, he refers to the case of *Macbride v. Macbride* (4 *Esp. Rep.*, 242), where the plaintiff called a woman as a witness to prove a part of his demand, and Lord Alvanley refused to allow the defendant's counsel to ask her whether she slept with the plaintiff. But these views are in conflict with the decision of this court in *The People v. Abbot* (19 *Wend.*, 192). Now, with all due respect for the opinions of this learned author, I must say, it seems to me the cases referred to by him do not properly fall within the qualification he states to the rule as laid down by Roscoe; for the reason that the commission of adultery or fornication injures the general character of either sex; and the degree of credit due to the testimony of a witness, depends as well on his general character as on that for mere veracity.

• Vicious habits of whatever kind, sear the conscience and prepare those who practice them for the easy utterance of falsehood. The late Justice Cowen thought the credit of a witness was much affected, when he confessed, upon a cross-examination, he had for some time led an idle and intemperate life, the inmate of porter houses at hours unseasonably late, and had for two years been wasting his means in a course of adulterous lewdness, alienated from his family, unjust to them and to his creditors. (See *The People v. Rector*, 19 *Wend.*, 586.)

In *Lohman v. The People* (1 *Comst.*, 879), the principal witness to sustain the indictment was a female, and she was interrogated without objection, on cross-examination, with the view of discrediting her, as to whether she had had sexual intercourse with any person other than one Cook, by whom she testified she became pregnant; and she was also asked whether she had not had the venereal disease; but she declined to answer the interrogatories, and the court refused to compel her to answer them, and to such refusal the prisoner's counsel

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excepted. Judge Gardiner, in delivering the opinion of the Court of Appeals in that case, assumed, that if the witness had given affirmative answers to the interrogatories, they would have affected her general character; but he held, the court did right in refusing to compel her to answer the interrogatories. It was adjudged in *The People v. Abbot* (*supra*), that on the trial of a person charged with the crime of rape, or an assault with intent, &c., the inquiry may be made of the prosecutrix, on cross-examination, whether she has not had previous criminal connection with other men, and that, in such case, she is not privileged from answering; also that on such a trial the prisoner may show the prosecutrix to be in fact a common prostitute. All that Lord Ellenborough decided in *Dodd v. Norris* (8 *Camp.*, 519), was that the plaintiff's daughter, who testified the defendant was the father of a child she had had, could not be compelled, on cross-examination, to answer whether, before her acquaintance with the defendant, she had not been criminal with other men.

Now, notwithstanding the above mentioned views of Greenleaf, and the cases cited by him to support them, the weight of authority is in favor of allowing questions to be put to witnesses on cross-examination, which do not relate to the matter in issue, if affirmative answers thereto would affect the general character of the witnesses. And in the case under consideration, I am of the opinion the prisoner's counsel should have been permitted to ask the witness Blakeley, on cross-examination, whether he had not been guilty of adultery, and whether he had not had a venereal disease since his marriage; for the reason, if such questions had been allowed and answered in the affirmative by the witness, his general character would have been somewhat impeached (1 *Greenl. Ev.*, §§ 455, 456), and it would then have been for the jury to determine whether his evidence was entitled to full credit. If the questions had been allowed and the witness had refused to answer them, as he might because they called for facts wholly collateral to the issue in the case, no inference unfavorable to his character could have been drawn from such refusal. (*Barbour's Cr. Tr.*,

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401; 1 *Greenl. Ev.*, § 451; *Cow. and Hill's Notes*, 747, 748.) Lord Ellenborough in *Millman v. Tucker* (2 *Peak.*, 222), told a witness, on his being asked by Erskine whether he had not been convicted of forging coal-meters' certificates, that he need not answer; and he told the jury that the witness, having availed himself of the privilege, was not thereby at all discredited; and he also said he himself should, had he been asked such a question, have refused to give an answer, for the sake of the justice of the country, and to prevent such an examination.

The district attorney had no right to object to the questions that were put to the witness, William G. Blakeley, in this case. (1 *Greenl. Ev.*, § 451; *The People v. Bodine*, 1 *Denio*, 280; *Ward v. The People*, 6 *Hill*, 144; *Barbour's Cr. Tr.*, 400.) But I think it is proper for the court, when such questions are put, to inform the witness of his privilege to decline answering. (*Cow. & Hill's Notes*, 747.)

The only other question in the case which I shall consider, is whether the prisoner should have been permitted to prove that the deceased stated to a witness, on the 18th day of April, 1855, he had signed the note and contract in question. The bill of exceptions shows, "it appeared in evidence that all hopes of recovering by the deceased ceased on the 13th of April, 1855;" also, that he died on the 20th day of that month. The contract and note bore the dates of April 16th and 17th, 1855.

I was inclined, on the argument, to the opinion that the above mentioned declaration was properly rejected as mere hearsay, in accordance with the general rule, which declares "such evidence is inadmissible to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses, who can speak from their own knowledge." (See *Wharton's Am. Cr. Law*, 244.) But subsequent reflection, and an examination of the authorities, have satisfied me the declaration should have been received as evidence. I will first remark that no person other than the prisoner, except the deceased, had any certain knowledge as to whether the latter signed his name to the note or

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contract; and unless the prisoner wronged him, or attempted to wrong him, by forging his name to those instruments, he committed no offence against the people; and it was against the interest of the deceased to say, on the 18th day of April, 1855, he had signed the note and contract. Secondly, declarations, which are secondary evidence, are sometimes received in consequence of the death of the person making them, whether they were made at the time of the fact declared, or at a subsequent day, when it is shown that he possessed competent knowledge of the facts, or that it was his duty to know them, and that the declarations were at variance with his interest. Greenleaf says: "When these circumstances concur (meaning in a proper case), the evidence is received, leaving its weight and value to be determined by other considerations." (1 *Greenl. Ev.*, § 147; *White v. Chouteau*, 10 *Barb.*, 202.) He further says, while speaking of the admissibility of this class of declarations in certain cases: "The ground upon which this evidence is received, is the extreme improbability of its falsehood." (*Id.*, § 148.) And he again declares: "In some cases the admissions of third persons, *strangers to the suit*, are receivable. This arises when the issue is substantially upon the mutual rights of such persons, at a particular time, in which case the practice is to let in such evidence in general as would be legally admissible in an action between the parties themselves." (1 *Greenl. Ev.*, § 181. See *Kelly's case*, 3 *City Hall Recorder*, 153.) It is true this is said only in regard to civil actions; but the rules of evidence in criminal cases are, in most respects, the same as in civil cases. (*Barb. Cr. Tr.*, 351.)

Roscoe declares that the declarations of deceased persons, made against their own interests, are admissible in some cases, "as where a man charges himself with the receipt of money, it is evidence to prove the payment." (*Roscoe's Cr. Ev.*, 4th *Am. ed.*, 26.)

The reason usually assigned for the rejection of mere hearsay as evidence, is its incompetency to satisfy the mind as to the existence of the facts sought to be established, as well as the frauds that may be practised under its cover. (*Wharton's*

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Am. Cr. Law, 2d ed., 244.) But what proof would be more convincing in this case, that the prisoner is innocent of the crime with which he is charged, than the declaration of the deceased, on the 18th day of April, 1855, that he had settled with the prisoner, and executed the note and contract in question? I answer, not any, except the positive assertion of a credible witness that he saw the deceased sign his name to them. The adverse interest of the deceased, and the fact that he believed he was on his bed of death, repel the idea of any fraudulent intent on his part in declaring he had executed the note and contract; and if he made that declaration while in his right mind, the presumption that it was true is exceedingly cogent, yea, almost morally certain. I must, therefore, hold that the declaration should have been received as evidence for the prisoner.

The judgment of the Delaware Oyer and Terminer should be reversed for the two erroneous rulings I have specified, and a new trial granted to the prisoner in that court; and he should be required to appear at the next Court of Oyer and Terminer, to be held in Delaware county, to stand trial on the indictment, and not depart that court without leave, and abide its orders and judgment.

CAMPBELL, J., concurred in the foregoing opinion. MASON, J., concurred in the same upon the first two propositions discussed in it, but expressed no opinion on the last question contained in it.

Judgment accordingly.

SUPREME COURT. Clinton General Term, May, 1859. *James, Roskrans and Potter*, Justices.

DANIEL O'LEARY, plaintiff in error, v. THE PEOPLE, defendants in error.

An assault and battery with intent to kill, is not a felony by our statute or at the common law, unless committed with a deadly weapon, or by such other means or force as are likely to produce death.

Where, in an indictment, the first two counts charged the prisoner with having committed an assault and battery with a deadly weapon, with intent to kill one M. C., and the third count charged an assault and battery upon the said M. C., with intent to maim her, and, on the trial, the jury found the prisoner "guilty of the crime of assault and battery with intent to kill," and the court thereupon sentenced the prisoner to imprisonment for two years in the State Prison, the judgment was reversed on the ground that, on the verdict rendered, the court was only authorized to punish for a simple assault and battery. And the case having been brought from the Court of Sessions to the Supreme Court, by writ of error, it was held that the latter court had not the power to order a new trial in the court below, but that the judgment of reversal was final.

Form of an indictment for assault and battery committed with a deadly weapon, with intent to kill, with a count charging an intent to maim.

Form of *certiorari* after writ of error, with a return thereto.

THIS case came up on writ of error to the Court of Sessions of Saratoga county. By the return to the writ it appeared that an indictment had been found against the plaintiff in error, in the following words:

Saratoga County, ss:

The Jurors of the People of the State of New York, in and for the body of the county aforesaid, to wit:

Lawrence W. Bristol, &c., &c., good and lawful men of the county aforesaid, then and there sworn and charged to inquire for the said People for the body of the county aforesaid, upon their oaths present: That Daniel O'Leary, late of the village of Waterford, in the county of Saratoga aforesaid, on the twenty-second day of September, in the year of our Lord one

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thousand eight hundred and fifty-seven, with force and arms, at the village of Waterford, in the county of Saratoga aforesaid, in and upon one Margaret Collins, then and there being, feloniously did make an assault, and her, the said Margaret Collins, with a certain deadly weapon, commonly called a cleaver, which the said Daniel O'Leary in his right hand then and there had and held feloniously, did beat, strike, and cut, and wound, with intent her, the said Margaret Collins, then and there feloniously and willfully to kill, and other wrongs to the said Margaret Collins, then and there did, to the great damage of the said Margaret Collins, against the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, on their oath aforesaid, do further present, that the said Daniel O'Leary, late of the town and village of Waterford, in the county of Saratoga, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, at the village and county aforesaid, in and upon Margaret Collins, then and there being, feloniously did make an assault, and her, the said Margaret Collins, with a certain deadly weapon commonly called a cleaver, which he, the said Daniel O'Leary, in both his hands then and there had and held, feloniously did beat, strike, and cut, and wound, with intent her, the said Margaret Collins, then and there feloniously and willfully to kill, and other wrongs to the said Margaret Collins, then and there did, to the great damage of the said Margaret Collins, and against the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, on their oath aforesaid, do further present, that the said Daniel O'Leary, on the said twenty-second day of September, in the year last aforesaid, with force and arms, at the village and county aforesaid, in and upon the said Margaret Collins, then and there being, feloniously did make another assault, and her, the said Margaret Collins, with a certain cleaver, which he, the said Daniel O'Leary, in both

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of his hands then and there had and held the said cleaver, being a deadly weapon, feloniously did beat, strike, cut and wound, with intent her, the said Margaret Collins, then and there feloniously and willfully to maim, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

JOHN O. MOTT, *District Attorney.*

The defendant pleaded not guilty, and on trial was convicted and sentenced to two years' imprisonment in the State Prison.

After a return to the writ of error, the plaintiff in error procured the issuing of a *certiorari*, as follows :

The People of the State of New York to our Court of Sessions of the county of Saratoga, *Greeting :*

We being willing, for certain causes, to be certified as to the exact words and form of the verdict rendered against Daniel O'Leary in your said court, upon an indictment against him, which said indictment and the judgment thereon, have been certified to our Supreme Court, in answer to the writ of error issued in behalf of said defendant, do command you, that, having searched the records of said Court of Sessions, the exact words and form of the verdict rendered against said Daniel, and whether that is the only verdict rendered against him in said court, you certify to our justices of our Supreme Court of Judicature, without delay, at the Capitol, in the city of Albany, fully and entirely as the same remains on record in your said court, and this writ.

Witness, George Gould, Esq., one of the Justices of said court, at Albany, September 3d, 1858.

R. BABCOCK, *Clerk.*

I. C. ORMSBY, *Attorney.*

To which *certiorari* the following return was made :

The answer of the Court of Sessions of the county of Saratoga to the within writ of *certiorari*. Searching the records of said court, we find, under date of June 14th, 1858, the

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following verdict, rendered against the said Daniel O'Leary, viz.: "The jury find the prisoner guilty of the crime of assault and battery, with intent to kill."

That the above are the exact words and form of said verdict, and the only verdict rendered against him in our said court.

And this we do certify to the justices of the Supreme Court, as we are within commanded.

Given under the seal of our said court, at Ballston Spa, October 30, 1858.

For the court.

JAMES W. HORTON, *Clerk*.

[L. S.]

I. C. Ormsby, for the plaintiff in error.

I. The judgment is erroneous. It is a familiar principle that *all* the circumstances essential to sustaining an indictment, must be expressly found by the jury. (1 *Chitty's Crim. Law*, 644; *Commonwealth v. Call*, 21 *Pick.*, 513; *Commonwealth v. Fischblatt*, 4 *Metcalf*, 355; *Fenwick v. Logan*, 1 *Missouri R.*, 401.)

Under this indictment, in order to convict the prisoner of the felony charged, four distinct, material, substantive facts were necessary to be found, to wit: 1st. An *assault*; 2d. A *battery*; 3d. An *intent to kill*; and 4th. By means of a *deadly weapon*. A general verdict of guilty would have embraced such a finding. Not so with a qualified verdict, for the very object of a departure from the usual form is presumed to be for the purpose of declaring the prisoner guilty of certain facts only. (*Commonwealth v. Call*, *before cited*.)

II. The only complete and substantive crime found by the jury was that of *assault* and *battery*, and the *intent* found is merely matter in aggravation. (*Commonwealth v. Fischblatt*, 4 *Metc.*, 356.)

It has been expressly held that an assault and battery with intent to kill, unless it be with some deadly weapon, or by some other means likely to produce death, is not a felony.

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(*Barb. Cr. Law*, 80; *Com. v. Barlow*, 4 *Mass.*, 489; 4 *Blackstone*, 207 (note k), *Christian's ed.*)

III. The English doctrine that, under an indictment for a felony, the prisoner cannot be convicted of a misdemeanor, does not prevail here. Accordingly, under an indictment for murder, the prisoner may be convicted of manslaughter; under an indictment for burglary or robbery, the prisoner may be convicted of simple larceny. (*The People v. Jackson*, 3 *Hill*, 92, and cases there cited.)

And on an indictment founded on a statute, the defendant may be found guilty at common law. (1 *Chitty Cr. Law*, 639.)

John O. Mott (District Attorney), for the defendants in error.

I. The only matters properly in the return of the clerk in this case to the writ of error, are, a transcript of the indictment and the judgment of the court; all others should be stricken out. The court of review is confined to such errors as appear upon the face of the indictment, or in the bill of exceptions. (2 *R. S.*, 4th ed., 923, § 22, 924, § 25; *The People v. McCann*, 3 *Park. Cr. R.*, 272.)

1. There being no bill of exceptions in the return, the only errors of which the defendant can take advantage, are such as appear upon the face of the indictment and the judgment. (2 *R. S.*, 4th ed., 924, § 25.)

2. The *certiorari* and return thereto should be disregarded by this court. They form no part of the records, and are not brought up by the writ of error. (*The People v. McCann*, 3 *Park. Cr. R.*, 272.)

II. The indictment is good on its face under 2 *Revised Statutes*, 4th ed., 851, § 38, and it is equally valid under 2 *Revised Statutes*, 4th ed., 852, § 41.

The judgment is such a one as a conviction under either section of the statute would authorize. (*The People v. Allen*, 5 *Denio*, 76; *Biggs v. The People*, 8 *Barb.*, 547.)

III. The verdict in this case was not a *special verdict*. In order to constitute a *good special verdict*, the jury must find all

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the facts constituting the crime, and bring it within the jurisdiction of the court. (1 *Chitty's Crim. Law*, 5th Am. ed., 636, 642; *Commonwealth v. Call*, 21 *Pick.*, 509; *Dyer v. Commonwealth*, 23 *Pick.*, 402; *Commonwealth v. Fischblatt*, 4 *Metcalf*, 854; *McGuffie v. The State of Georgia*, 17 *Georgia*, 497.)

IV. The verdict in this case is a *general verdict* under section 38, 2 *Revised Statutes*, 4th ed., 851; and also under section 41, 2 *Revised Statutes*, 4th ed., 852, and the sentence of the prisoner to the State prison for a term not exceeding five years, is sustained by the verdict. (*Commonwealth v. Fischblatt*, 4 *Metcalf's R.*, 854; *The People v. Shaw*, 1 *Park. Cr. R.*, 327; *The People v. Jackson*, 3 *Hill R.*, 92; *The People v. White*, 22 *Wend.*, 175; *McGuffie v. The State of Georgia*, 17 *Georgia*, 497; *Girts v. The Commonwealth*, 22 *Penn. R.*, 351.)

1. Under an indictment for murder, the prisoner may be convicted of manslaughter. (*People v. Jackson*, 3 *Hill*, 92.)

2. So the prisoner may be convicted of simple larceny, under an indictment for burglary or robbery. (*People v. Jackson*, 3 *Hill*, 92; *People v. White*, 22 *Wend.*, 175.)

3. If the court should be of opinion that we are not allowed to refer to the indictment for the means or weapon with which the assault and battery was committed, then we say the verdict is good under the 41st section, as by that section no instrument or means are required except the act and intent.

V. If the court is of opinion that the verdict is not one of guilty, then the prisoner must be again put on his trial. (*Commonwealth v. Call*, 21 *Pick.*, 509.)

ROSEKRANS, J. The verdict rendered in this case is not a special verdict, as it omits to find the facts upon which judgment of law is to be pronounced by the court. But it is a general verdict of guilty as to the charge of assault and battery, but not of the assault and battery with a cleaver, with intent to kill. It is a partial verdict—a verdict of guilty of a part of the charge contained in the indictment, and is silent as to the residue of the charge. It may be that the jury intended by the verdict to cover the entire charge in the indictment, and

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before it was rendered and the jury discharged, their attention might have been directed to the informality by the court, and the verdict corrected. But nothing should be left to intendment or inference after the verdict is rendered. It should be either a general verdict of guilty when the whole charge is sustained, or a special verdict, finding all the facts to sustain the whole charge, in order to subject the defendant to the full punishment prescribed by statute for the offence. The fact that the jury have chosen not to find a general verdict of guilty, or a special verdict setting forth all the facts necessary to constitute the entire offence charged, furnishes an argument that they do not intend to find the defendant guilty of the whole offence charged, but only of such parts of it as are included in the verdict. The offence charged in this case was an assault and battery with a cleaver (a deadly weapon), with intent to kill. The jury found the defendant guilty of the crime of assault and battery, with intent to kill. They did not, however, find that the assault and battery was with a cleaver, or that the defendant intended to kill the person assaulted with a cleaver. An assault and battery, with intent to kill, is not a felony, unless it is committed with a deadly weapon, or by such other means or force as are likely to produce death. (3 R. S., 5th ed., 944, § 38.) It is better to hold to some degree of strictness, as to the manner of rendering verdicts and entering them in the minutes of the court, than to leave the design of the jury a matter of doubt, or of inference or argument. Under this indictment, the defendant could be convicted of a simple assault and battery, and as the verdict is sufficiently formal for that offence, judgment should have been rendered against the defendant on that verdict.

The judgment of the Court of Sessions should be reversed. We can neither give a new judgment, nor send the case back for a proper judgment. (*People v. Taylor*, 3 Denio, 91; *Commonwealth v. Fischblatt*, 4 Met. R., 354; *Dyer v. Commonwealth*, 23 Pick., 404; 2 Camp. R., 646.)

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POTTER, J. The defendant was indicted for two statute offences. The first and second counts were for the same offence, only varied in statement—for an assault and battery with a deadly weapon, with intent to kill one Margaret Collins. The third count was for an assault and battery upon the said Margaret Collins, with intent to maim her.

A trial was had before the Saratoga Sessions. The jury rendered their verdict, "that they find the prisoner guilty of the crime of assault and battery with intent to kill." The judgment of the court upon this verdict, was a sentence of the prisoner (the defendant), to imprisonment in the State Prison for two years.

So much of the case was brought up by writ of error. A *certiorari* was also issued in the case, upon which the clerk returns the verdict in form as rendered by the jury, and that the exact words and form of the verdict of the jury were as above given, and *that* was the only verdict rendered against the defendant in said court.

Thus we have before us, by writ of error and *certiorari*, all that the defendant desires to have reviewed. The attorney for the People objects to so much of the case as is brought up by *certiorari*, and moved to have it struck out of the case.

I think the practice in this district justifies the bringing up of any errors that affect the party, whether in, or *dehors* the record, or otherwise, and that we should therefore pass upon all questions brought before us by writ of error, or *certiorari*, or both.

The verdict of the jury was a special verdict, and did not find the defendant guilty of either of the statute offences for which he was indicted.

The offence defined in the 38th section, Revised Statutes, 665 (944 5th ed.), is as follows: "Every person who shall be convicted of shooting at another, or attempting to discharge any kind of arms or air-gun at another, or of any assault and battery upon another by means of any deadly weapon, or by such other means or force as was likely to produce death with the intent to kill, maim, ~~perish~~ or rob such other person," &c., "shall be punished," &c.

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The offences that are described in the 41st section, are a class of offences, the punishment of which is not before prescribed. As the punishment of the offence described in the indictment is prescribed in the above 38th section, it will be seen that the 41st section has nothing to do with this case.

The indictment in this case is a good indictment in form for the offence it describes, and the offence set forth comes within the 38th section of this statute. The jury, however, have not found the defendant guilty of that which constitutes the main feature of the crime, to wit: the commission of the act *by means of any deadly weapon*.

Had the indictment charged all the means by which the offence might have been committed, or that it was committed by such other means or force as was likely to produce death with like intent, which means or which force was to the grand jury unknown; or had the petit jury found the defendant guilty of the offence for which he was indicted, or generally *guilty*, so as to meet the charge, the court would see that the verdict was broad enough to meet the charge. But upon this writ of error we must take the verdict as it is rendered. It is entirely probable that the jury *intended* to find him guilty under one of the first two counts, instead of the third, and that their verdict was intended so to express their finding. This verdict might have been made definite at the time by their explanation, but it was not, and we cannot now speculate upon it. The form of the verdict must be such that all the circumstances constituting the offence must be found, in order to enable the court to give judgment; for the court cannot supply a defect in the statement made by the jury on the record, by any intendment or implication whatsoever. (1 *Chit. Cr. L.*, 648; 4 *Met.*, 354; 21 *Pick.*, 505.)

An assault and battery with intent to kill, is not a felony by our statutes, nor at common law. It is only felony when committed with some deadly weapon, or with some other means or force likely to produce death. (*Barb. Cr. L.*, 80, and authorities cited.)

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If we had the power, I should like to send the case back for a new trial, but I do not think we have the power. See opinion of Bronson in *People v. Taylor* (3 Denio, 97).

Judgment reversed.

CORTLAND OYER AND TERMINER. June, 1859. Before *Mason*, Justice of the Supreme Court, and the Justices of the Sessions.

THE PEOPLE v. GEORGE SAUNDERS.

To an indictment for rape, the prisoner pleaded that he had been convicted before W. B., a justice of the peace, on the oath of the prosecutrix, E. R. J., of an assault and battery upon her, and fined twenty dollars, which fine was paid by him, and that the assault and battery of which he was so convicted, was the same assaulting, beating, ravishing and carnally knowing of the said E. R. J., charged in the indictment for rape. On demurrer to such plea, it was adjudged bad, on the ground that the facts set forth in it constituted no defence to the indictment for rape.

An acquittal upon an indictment for a felony, constitutes no bar to an indictment for a misdemeanor; and an acquittal for a misdemeanor is no bar to an indictment for a felony.

To make the plea of *autrefois convict* or *autrefois acquit* a bar, it is necessary that the crime charged in both cases be precisely the same; and in considering the identity of the offences, it must appear by the plea that the offence charged in both cases was the same, in law and in fact.

This case does not come within the provision of the Revised Statutes, which makes an acquittal or conviction, on a former trial for an offence, a bar to an indictment for such offence in any other degree, or for an attempt to commit such offence.

Where, in a case of felony, a plea of *autrefois acquit* or *autrefois convict* is interposed and overruled, there should be judgment of *respondens ouster*.

THE defendant was indicted in the Oyer and Terminer of Cortland county for a rape, and interposed two pleas of *autrefois convict*, to which pleas the District Attorney demurred. The first plea alleged that the defendant was convicted before William Blanchard, Esq., a justice of the peace of the town of Truxton, on the oath of the prosecutrix, of an assault and

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battery upon her, the said Eunice Rebecca Johnson, and fined \$20, and sentenced to thirty days' imprisonment in the county jail, in case the said fine was not paid, and that he paid said fine; and the plea alleged that the said assault and battery, of which the said defendant was so convicted as aforesaid, was the same assaulting, beating, ravishing and carnally knowing the said Eunice Rebecca Johnson charged in the indictment mentioned, and was one and the same assault and battery, and not other and different, &c.

The second plea differed from this only in that it alleged that the said Eunice Rebecca Johnson made complaint on oath to the said Wm. Blanchard, Esq., a justice of the peace of the town of Truxton, in said county, and said Blanchard issued his warrant against said defendant, charging him with a rape alleged to have been committed upon the said Eunice Rebecca, and which was the same identical offence charged in the indictment in this case. That defendant was arrested on said warrant, and brought before said justice, and that a full examination was had, and the said justice decided that there was no probable cause to hold the said defendant on the charge of rape, but that there was probable cause to hold him for assault and battery; and that the defendant elected to be tried by a Court of Special Sessions, and that thereupon the said defendant was put upon his trial for assault and battery, before the said justice sitting as a Court of Special Sessions, and was convicted and fined \$20, &c., &c.

A. P. Smith (District Attorney), for the People.

H. C. Miner, for the prisoner.

MASON, P. J. These pleas constitute no bar to this indictment for a felony; and acquittal, even upon an indictment for a felony, is no bar to an indictment for a misdemeanor, and an acquittal for a misdemeanor is no bar to an indictment for a felony. (2 *Hawk. P. C.*, 35, §5; *Arch. Cr. Plead.*, 88.) The justice had no jurisdiction to try the felony for which the de-

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defendant is now indicted. He could not, on the examination, even pass upon the question of the defendant's guilt or innocence. The only thing which the statute allowed him to determine was the question whether there was probable cause to believe the defendant guilty, and this only for the limited purpose of committing him to await his trial before a court that has jurisdiction to try him, or of requiring him to give sureties to appear before such court and answer to an indictment.

The defendant was tried simply on a charge of assault and battery, as is shown by the defendant's pleas, and was convicted of that charge.

This constitutes no defence to an indictment for a rape. To entitle the defendant to this plea, it is necessary that the crime charged be precisely the same (1 *Chitty Cr. Law*, 452); and in considering the identity of the offences, it must appear by the plea that the offence charged in both cases was the same in law and in fact. The plea will be vicious, if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact. (12 *Pick. R.*, 496; 1 *Park. Cr. R.*, 182, 183; 3 *Park. Cr. R.*, 579; *Arch. Cr. Pl.*, 91.)

The former conviction must have been for the same identical crime. (4 *Black. Com.*, 836; *Russ. on Cr.*, 829, 836; 1 *Park. Cr. R.* 184.) In these cases the plea will be held vicious unless the first indictment was such that the prisoner might have been convicted upon it by proofs of the fact contained in the second indictment. (1 *Russ. on Cr.*, 831; 1 *Park. Cr. R.*, 184; *Arch. Cr. Pl.*, 87; *Rex v. Taylor*, 3 *Barn. & Cress.*, 502; 3 *Park. Cr. R.*, 579.)

There is another reason why the pleas must be held void. The plea of *autrefois convict* admits the offence charged in the indictment, and as these pleas admit the crime of rape against the defendant, he could not be convicted of assault and battery, for the misdemeanor was merged in the felony. (5 *Mass. R.*, 106; 9 *Cow. R.*, 578; 1 *Comst. R.*, 384; 1 *Russ. on Cr.*, 50; 2 vol. *Id.*, 550; *Bouv. Law Dict.*, titles "Merger," "Cr.

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Law," 1 *Park. Cr. R.*, 186; 22 *Pick. R.*, 508; 2 *Eng. Law and Equity R.*, 448.) The defendant cannot, upon this indictment, be tried or convicted of assault and battery. This is well settled at common law, and our statute is but declaratory of the common law (2 *R. S.*, 702, §§ 27 and 28), which prescribes the rule for plea of former acquittal or conviction. It only applies to offences where the statute has fixed different degrees to the offence, and in such case a former trial and acquittal or conviction for any one of the degrees of such offence, shall be a bar to an indictment for such offence in any other degree, or of an attempt to commit such an offence. These demurrers to the defendant's special pleas are sustained, and judgment given for the People thereon. The defendant was right in pleading over to this felony the plea of not guilty. (*Arch. Cr. Pleading*, 89, 90, 91; *Rex v. Vandercomb*, 2 *Leach*, 708; *Rex v. Cogan*, 1 *Leach*, 448; *Rex v. Shaw*, 2 *Carr. & P.*, 635.) This, however, is of little consequence, as the judgment in cases of felony on such pleas is *respondeo ouster*. (*Arch. Cr. Pl.*, 91; 12 *Hawking Cr. Law*, 23 and 128; 2 *Carr. & P.*, 634.)

Pleas overruled and judgment of *respondeo ouster*.

SUPREME COURT. Otsego General Term, July, 1859. *Mason, Balcom and Campbell*, Justices.

LEWIS DIBBLE, plaintiff in error, v. THE PEOPLE, defendants in error.

On the trial of an indictment for uttering counterfeit bills or notes, it is not competent for the prosecution to prove the subsequent uttering by the prisoner of other forged bills or notes, unless it be shown that they were of the same manufacture as those charged in the indictment, or are in some way connected with the offence charged.

THE prisoner was convicted at the February term of the Otsego Court of Sessions, in 1859, of *forgery in the second degree*, to wit: for uttering as true, to one Newman, a certain counter-

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feit promissory note called a bank bill, which purported to have been issued by "The Westfield Bank," a corporation duly formed under and by virtue of the laws of Massachusetts. He was sentenced to imprisonment in the State Prison at Auburn for the term of five years and two months. His counsel took exceptions on the trial, and made a bill of exceptions, which formed part of the record of conviction. He afterwards sued out a writ of error, and obtained a stay of proceedings on the judgment. The writ of error, with a transcript of the record, was sent to this court.

L. I. Burditt and A. Becker, for the prisoner.

L. L. Bundy (District Attorney), for the People.

By the Court, BALCOM, J. The district attorney proved that the prisoner passed the counterfeit note or bill described in the indictment, to one Newman, as genuine. He then proved, by Smith Kinyon, that the prisoner, a day or two thereafter, went from his residence, near Oneonta, to Catskill, and that while going there he staid over night at a tavern kept by one Stevens, and there bought a ring of a pedler, and gave him a five dollar bill to pay for it. The pedler remarked that the bill was good, and he would take it for any goods he had. A bystander said it was not good, but the pedler took it and gave the prisoner the difference in small bills and change—the price of the ring being two or three dollars. That at Steele's the prisoner purchased a ring of another pedler for two dollars. He gave the pedler a five dollar bill in payment therefor, and received small bills and change from him, over and above the price of the ring. The last mentioned pedler again saw the prisoner at Prattsville, and there said to him the bill he let him have was bad, and that a postmaster told him it was bad. The prisoner then said to the pedler, he would take it back, "as he took it for good money," and he thereupon gave back the ring, small bills and change to the pedler, and received the five dollar bill from him.

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Kinyon could not tell the name of the bank by which the two bills the prisoner passed to the pedlars purported to have been issued. Those bills were not produced at the trial, nor was there any evidence given, except that above mentioned, to show they were forged or counterfeit.

The prisoner's counsel moved the court to strike out the testimony of Kinyon, as illegal, irrelevant and incompetent, because the proof did not show on what bank either bill he spoke of was, or that they were counterfeit, and upon the ground that the bills were not produced, which motion the court denied, and the prisoner's counsel excepted to the decision. The court charged the jury that the testimony of Kinyon was clearly admissible, as connected with the evidence of Isaac B. Smith, but left the question to the jury as to its importance and materiality, and whether it reflected much or little, or none at all, upon the guilty knowledge of the prisoner in passing the bill for which he was indicted. The prisoner's counsel excepted to the charge.

Smith never saw either of the bills the prisoner passed to the pedlars, and never heard the prisoner say anything about them, or speak of having passed any such bills to any person.

The weight of authority is, that in order to enable the prosecutor to give evidence of other utterings of forged notes or bills *subsequent to that charged in the indictment*, they must in some way be connected with the principal case, or the notes or bills must be of the same manufacture and precisely similar. (*Wharton's Am. Cr. Law*, 2d ed., 233; *Roscoe's Cr. Ev.*, 4th Am. ed., from 3d London ed., 93, 94; *Cow. & Hill's Notes*, 462, 463.) *Greenleaf* says: "It has been held that in case of subsequent facts they must appear to have some connection with the principal fact charged. Thus, in a charge of forgery, evidence of the *subsequent uttering* of other forged notes was held inadmissible, unless it could be shown that they were of the same manufacture." (3 *Greenl. Ev.*, 4th ed., § 15.)

The passing of the bills to the two pedlars by the prisoner, was in no way connected with the passing of the one to Newman, for which he was indicted, and it was not shown that the

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bills passed to the pedlers were forged or counterfeit, except by what one of them and a bystander said, and the act of the prisoner in taking one of them back, and the circumstances under which he passed them; nor was there any proof that those bills were of the same manufacture, or on the same bank, or similar to the one passed to Newman. Hence, according to the authorities above cited, the court erred in refusing to strike out the testimony of Kinyon; and also in charging the jury it was admissible as connected with that of Smith. The testimony of Smith did not in any way connect the passing of the bills to the pedlers with the passing of the one to Newman. It only tended to show that the prisoner committed another and independent felony subsequent to the uttering of the counterfeit bill or note to Newman. It should, therefore, have been struck out of the case, and the jury should have been directed to disregard it. The judgment of the Otsego Court of Sessions should be reversed, and a new trial granted to the prisoner in that court, and he should be required to appear at the next term of such court and abide its order and determination.

Decision accordingly.

SUPERIOR COURT OF BUFFALO. November Criminal Term, 1854.
George W. Clinton, Justice, presiding.

THE PEOPLE *v.* THOMAS O'BRIEN.*

It is very questionable whether surprise, founded on a mistake in law, can be a ground for a new trial. It cannot be where it arose solely from the negligence of the moving party.

Where the defendant had been convicted of keeping a disorderly house, and on motion for a new trial, it appeared from his affidavits that the conviction was had solely upon evidence that his *tenant* of the basement kept that part of the house in a disorderly manner; that he, the defendant, occupied the floor above, and supposed he was only required to defend, as he did, the character of the part occupied by himself, and the affidavits did not show that he had, but left the inference that he had not, disclosed all the facts to his counsel, and did not show that he had discovered any material evidence not before known to him and within his reach: *Held*, that he was not entitled to a new trial.

It seems that the Superior Court of Buffalo has power to grant a new trial to a defendant convicted of a misdemeanor, either on the judge's minutes at the same term at which he was convicted, or on a case at the general term.

MOTION for a new trial. The defendant had been convicted at the last September criminal term, Justice Houghton presiding, of keeping a disorderly house, and, upon affidavits including his own, applied for a new trial. It was shown by the affidavits that he occupied the first floor of a house and his tenant the basement, and that he supposed he would be called upon to defend the character of the first floor only, and that the conviction was had only upon evidence that the basement was kept in a disorderly manner. The affidavits also stated facts tending to show that he was not guilty of the disorderly keeping of the cellar, or accessory to it.

———, for the defendant.

A. Sawin (District Attorney), for the People.

* The Reporter considers the following cases, decided by the Superior Court of Buffalo, a valuable addition to the volume. Some of them had been already in part prepared for publication, by Francis E. Cornwell, Esq., of Buffalo, when they came to the Reporter's hands.

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By the Court, CLINTON, J. The application is solely on the ground of surprise, and not on the merits. The defendant does not claim that he has newly discovered material evidence, nor that the verdict was not founded on sufficient evidence. He says, in effect, that he misunderstood the extent of the charge, and that, had he known its full extent—had he supposed that he could be convicted of keeping the cellar—he could and would have exonerated himself by proving the facts which have been sworn to on this application. Assuming that the Superior Court has power to entertain this application, and that it is properly made here, instead of to the general term, there are two objections to granting the motion.

In the first place, the alleged surprise is based upon the defendant's mistake of law, and it is, at the least, very questionable, whether such a mistake can ever constitute surprise. But, assuming that it may, the defendant ought not to have any advantage of it, if it arose solely from his own negligence. The first duty of a client is to state his case fully to his counsel; and it is, in general, the duty of counsel to probe the case of his client to the bottom. Can it be doubted that, if the defendant had used due care and fullness in communicating the case to his counsel, or, if his counsel had done his duty in probing the case, the defendant would have known that the facts now spread before us were material to be proven on the trial. That the defendant, or his counsel, were guilty of laches in preparing the cause, cannot be ground for disturbing the verdict. Here, however, the party does not complain of his counsel. He does not aver that he was wrongly advised, nor that he was not fully advised upon his statement of the case to counsel, nor, in fact, that he ever took the advice of counsel. Upon the facts before us we must conclude, either that he carelessly misled counsel, or that, without any disclosure of the case to counsel, and upon his own responsibility, he rushed rashly before the jury for trial, "like a horse into the battle." He must bear the consequences, or no conviction can stand.

But, aside from this, there remains the fatal objection that the evidence adduced on the trial is not before us. Taking for

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granted the facts set forth in the affidavits, we cannot say but that the conviction was perfectly warranted by the evidence despite their existence. This power of granting new trials in criminal cases, for causes other than error or irregularity, if the power exists at all, is one that should be exercised with the greatest circumspection. Where the application is founded upon newly discovered evidence, or the non-introduction of evidence through surprise, or upon surprise by false evidence, it seems to me that there can be but very few cases, if any, in which a new trial can safely be granted without a deliberate and full examination of the testimony below. The court ought to be convinced that the verdict would have been, or might properly have been, the other way, but for the surprise, or if the newly discovered evidence had been adduced.

Especially is a case requisite where, containing the evidence, as here, the application is to a tribunal differently constituted from that before which the trial was had. The defendant must show that the verdict below would have been against law or evidence, if the testimony disclosed by his affidavits had been produced before the jury, and he can show this only by a case regularly settled, unless the case is waived or a substitute adopted by the parties. (7 *Wend.*, 331.)

Having arrived at these conclusions, it is not necessary to pass upon the other questions which were raised upon the argument, and the motion must be denied. But I deem it proper to add that the strong impression I entertained against the existence of a power in the Superior Court to grant a new trial upon the merits in a case of conviction for a misdemeanor, has been very much shaken; and to add my impression that the motion ought not to be entertained, unless it be made upon the minutes of the court at the term at which the conviction was had, or upon a case at the general term.

Motion denied.

SUPERIOR COURT OF BUFFALO. October General Term, 1854. *Clin-ton, Verplank and Houghton, Justices.*

THE PEOPLE *v.* JAMES M. FISH.

Receiving on storage for hire, or purchasing, grain by false weights, in the business of a warehouseman and merchant, was a misdemeanor at common law; the offence being now made a felony by statute, the misdemeanor is merged in the felony.

In such a case, an indictment is bad on demurrer, which does not charge defendant's acts and intents to have been *felonious*.

It is also bad where it charges the intent to deceive and defraud "divers citizens of the State," but omits to name them, or to aver that they were to the jurors unknown.

Whether it is necessary that the caption of the indictment should state that "the jurors were sworn, &c., for the People of the State of New York and the body of the county of (Erie)," instead of "for the body of the county of (Erie)" merely.—*Quere?*

Form of demurrer book, on demurrer to indictment.

DEMURRER to indictment. The indictment was found at the Oyer and Terminer, held in and for the county of Erie, in September, 1854, and was sent to the Superior Court of Buffalo for trial.

The indictment was at common law for buying and receiving and storing grain for hire, by false weights, in the exercise of the defendant's business as a warehouseman. The demurrer book containing the indictment and demurrer, with the proper recitals and statements, was as follows:

At a Court of Oyer and Terminer, held at the Court House in the city of Buffalo, in and for the county of Erie, on the eighteenth day of September, in the year of our Lord one thousand eight hundred and fifty-four, by and before the Honorable B. F. Green, one of the justices of the Supreme Court, and Zebulon Ferris and Jesse Lockwood, Esquires, Justices of the Peace, designated as members of the Court of Sessions in and for the said county. Orlando Allen, foreman, and Philip Byron, Henry Longnecker, &c., &c.,

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[naming the grand jurors] Jurors of the People of the State of New York, in and for the said county of Erie, then and there duly impaneled, sworn and charged to inquire for the body of the said county, upon their oath present as follows :

State of New York, County of Erie, ss :

The jurors of the People of the State of New York and for the body of the county of Erie aforesaid, upon their oath, present: That James M. Fish, on the first day of March, in the year 1854, and from thence until the taking of this inquisition, did use and exercise, at the city of Buffalo, in the county of Erie aforesaid, the trade and business of a warehouseman, and also the trade and business of receiving, storing and weighing cargoes of grain of all kinds, to wit: corn, wheat, barley and oats, from vessels, schooners, brigs, sloops, steamboats and propellers in the Buffalo creek in said city being, in his said warehouse for the purpose of storage, transhipment and purchase, and on the days and times, and at the place aforesaid, did use and exercise the trade of weighing such aforesaid cargoes of grain for the owners, consignees and carriers thereof, for certain large sums of money paid by the said owners thereof to the said James M. Fish, and did, during said times and at said place, weigh, store, receive and purchase one thousand bushels of corn, one hundred bushels of barley, one hundred thousand bushels of wheat, one hundred thousand bushels of oats; and that the said James M. Fish, contriving and fraudulently intending to cheat and defraud the People of said State, whilst he used and exercised his said trade and trades, business and businesses, to wit: on the first day of April, 1854, and on divers other days and times between that day and the taking of this inquisition, at the city aforesaid, did, knowingly, falsely and fraudulently, keep in a certain warehouse and elevator there, wherein he, the said James M. Fish, did so as aforesaid carry on his trade and trades, business and businesses, certain false weights for the weighing of aforesaid cargoes of said different kinds of grain by him as aforesaid received, stored, pur-

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chased and weighed, which said weights were then and there, by artful and deceitful contrivances, so made and constituted as to cause every quantity of said different kinds of grain received in said warehouse and elevator, and weighed by said false weights, thereby to appear of less weight than the real and true weight, by one-twentieth part of such true weight; and that the said James M. Fish, well knowing the said weights to be false, as aforesaid, did then and there, to wit: on the several days and times aforesaid, at the city and in the county aforesaid, willfully, falsely and fraudulently, into his said warehouse and elevator, and with the aforesaid false weights, divers quantities of aforesaid different kinds of grain transferred from aforesaid vessels, schooners, brigs, steamboats and propellers, into his said warehouse and elevator, in the way of his aforesaid trade and trades, business and businesses, weigh, receive, store and purchase, to wit: one hundred thousand bushels of corn, one hundred thousand bushels of barley, one hundred thousand bushels of wheat, one hundred thousand bushels of oats, and which last aforesaid corn, wheat, barley and oats, by reason of their being weighed by said false weights, were then and there very much deficient of their true and just weight, to the great damage and deceit of the People of said State, to the evil example of all others in like cases offending, and against the peace of the People of the State of New York and their dignity.

ALBERT SAWIN, *District Attorney.*

Indorsed "a true bill."

ORLANDO ALLEN, *Foreman.*

Which bill being presented to the said Court of Oyer and Terminer by the said jurors, it was on the twenty — day of September aforesaid, prayed by the said Albert Sawin, district attorney, as aforesaid, that the said bill might be filed in the said court before the said justices; and it was ordered by the said court that said bill should be filed in said court, and it was done accordingly.

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And thereupon, it was prayed by the said Albert Sawin, on behalf of said People, that the said bill might be sent to the Superior Court of Buffalo for determination, and it was done accordingly.

And hereupon, the said James M. Fish appears in his own proper person, in the said Superior Court of Buffalo, before the justices thereof, on the second day of October, 1854, and the said Albert Sawin, who prosecutes for said People, also comes and brings into the said court the said bill; and the said James M. Fish prays that the same may be read to him; and it is read to him; and thereupon the said court orders that said bill be filed in said Superior Court, and it is done accordingly.

And the said James M. Fish is thereupon ordered by said court to answer said bill, and he answers the same accordingly, and says that there is no such court as the Superior Court of Buffalo, which, by the laws of this State, can or ought to take cognizance of the said bill and the matters therein alleged.

And he also says, that if the said court can or ought to take cognizance of the said bill and the matters therein alleged, then, he says, that said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said James M. Fish, is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, for want of sufficient authority in this behalf, and for want of a sufficient indictment in this behalf, the said James Fish prays judgment, and that the court here may not take cognizance of said bill, and that he may be dismissed and discharged by said court, from the said premises in said indictment specified.

And hereupon, the said Albert Sawin, who prosecutes for the said People in this behalf, says that this court has the power and the authority by law, and ought to take cognizance of the said bill and the matters therein alleged.

And he also says that the said indictment, and the matters therein alleged, in manner and form as the same are above stated, are sufficient in law to compel the said James M. Fish

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to answer the same; and this the said Albert Sawin, who prosecutes as aforesaid, is ready to verify and prove the same, as the court shall direct and award. Wherefore, inasmuch as the said James M. Fish hath not answered to the said indictment, nor hitherto in any manner denied the same, the said Albert Sawin, for the said People, prays judgment, and that the said James M. Fish may be convicted of the premises in the said indictment specified; but because, &c.

D. Tillinghast, for the defendant.

1. The court has no jurisdiction of this case.
2. The grand jury was never sworn to inquire for the People of the State of New York. This is a defect.
3. The indictment is defective in not disclosing the means by which the alleged cheat was effected.

It is not enough to say that it was done by false weights, and that those weights were artfully and deceitfully contrived.

The facts of the act and deceit should be alleged. (1 *Chitty Crim. Law*, ed. 1886, 226; 9 *Cowen Rep.*, 586; 5 *Term Rep.*, 624.)

4. In relation to the act and deceit, no *scienter* is alleged.
5. It is defective because it does not give the name of any individual who was defrauded.

6. It does not show how the fraud was committed, nor allege that their names were to the jurors unknown.

7. It does not state in what particular character defendant got possession of the grain, whether as bailee or purchaser. It is defective for that reason.

8. If any person is charged with being defrauded, it is the defendant.

9. It is alleged that defendant intended to cheat the people, but it does not tell how it was to be done or intended to be done.

If the indictment is uncertain as to whether defendant was bailee or purchaser, then it is bad for uncertainty. (2 *Burr.*, 1127.)

Albert Sawin (District Attorney), for the People.

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By the Court, CLINTON, J. The defendant denies that "there is any such court as the Superior Court of Buffalo, which, by the laws of this State, can or ought to take cognizance of" this indictment. The court is organized under an act of the Legislature, and the counsel cannot expect us to deny our right to exercise the powers we are daily exercising. The precise point of the objection is not explained, and it can hardly be considered as addressed to us.

It is claimed that the indictment is not warranted by the common law. The facts that no instance of such a prosecution is on record, and that no assertion that the acts averred are a common law offence is to be found in any treatise or book of law, are undoubtedly well calculated to produce doubt, but they are not conclusive. The common law lays down general as well as particular definitions of crime—it defines classes of crime, as well as instances of the class, the species as well as the variety—and whatever act, or series of acts, comes within the general definition, or class, or species, must constitute a particular offence. The better general definition of indictable cheats and frauds at common law, is "the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony), which affects or may affect the public." Selling by false weights or measures, comes within the definition. The fraudulent weight or measure, is a false and deceitful token, which may injuriously affect the public, and the practice of selling by it does so affect it. Buying, or receiving and storing for hire, by false weights or measures, in a recognized and most important department of commercial business, is plainly within the spirit of the definition, and these practices are equally if not more injurious to the public than the selling or retailing of property by such false token. It may be true, that when the first indictment for selling by false weights was sustained, the mischief of buying or receiving by them was not felt by the public; but from the growth of commerce, either must now be, if a practice, one of a most alarming nature, well worthy of the most decided reprehension

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of the law. I am opinion that an indictment will lie for this offence.

If, however, this misdemeanor at common law is now a statutory felony, the misdemeanor is merged. False weights are false tokens. They were held to be so long before the statute of cheats. The revision of 1813 (1 R. L., 410, § 1), provided for cheats by false pretences only; but the Revised Statutes broadened the definition so as to include the common law offences, and declared them all felonies. Those statutes now provide that "every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretence," "obtain from any person any money, personal property, or valuable thing," shall be guilty of a felony. This statute increases the number of indictable cheats, and makes them felonies. I do not see how any cheat can now be regarded as a mere misdemeanor; and the indictment is for felony.

It is bad, because it does not charge the acts and intents of the prisoner to have been felonious.

It sufficiently describes the instruments of the cheat and the manner of cheating thereby.

But an indictment must, as an almost universal rule, give the accused notice of all the particulars of the crime charged, which may aid him in preparing for his defence, or show a valid excuse. Hence, when a fraud is charged, the person defrauded must be named, or, in excuse, the grand jury must aver that he is to them unknown. In this indictment it would have been sufficient to charge only one receipt by false weights, in fraud of a single person named. So it has been held sufficient to charge sales to divers persons to the jury unknown. Here the charge is of receipts from divers persons, and they are not, nor is any one of them named, nor are they averred to have been to the jurors unknown.

The caption of the indictment is probably sufficient, but I am not clear that it is so. The indictment was found in and comes to us from another court, and the caption is therefore, I think, a part of it. If it be necessary to the due organization

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of the grand jury that the jurors be sworn to inquire "as well for the People of the State of New York as for the body of the county of Erie," and they were sworn only "to inquire for the body of the county of Erie," there would seem to be a strong indication of a substantial irregularity which has not been waived by pleading, and it may follow that the defect is not one of those defects which our statute requires us to disregard, as "a defect or imperfection in matters of form, which does not tend to the prejudice of the defendant;" and the public prosecutor must excuse us for suggesting that the safer course is to adhere to the immemorial form of the caption.

Judgment for defendant.

SUPERIOR COURT OF BUFFALO. December Criminal Term, 1854.
George W. Clinton, Justice, presiding.

THE PEOPLE v. JACOB TRAVIS.

Perjury cannot be assigned of a false oath to a protest taken before a notary public, as part of the preliminary proofs in case of a marine loss. The oath in such a case is a voluntary and extra-judicial proceeding.

MOTION for leave to enter a *nolle prosequi*, with a view to bring up the question of the sufficiency of the indictment.

The indictment alleged that on the 16th day of November, 1853, the schooner Hope, of which the defendant was master, was wrecked and lost on Lake Erie; that one Samuel Watson, was owner of the schooner, and had before the time of the loss procured a policy of insurance to the amount of \$600, to be executed for his benefit by the Atlas Mutual Insurance Company; that the defendant, on the 21st day of November, at Buffalo, before Samuel T. Atwater, a notary public, swore, as master, to the truth of a protest setting forth a history of the circumstances leading to and accompanying the loss, which protest is set forth in, and parts of it are negatived by, the

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indictment, which concludes with the general allegation that the defendant did, in manner aforesaid, &c., commit willful and corrupt perjury.

A. Sawin (District Attorney), for the People.

— — —, for the defendant.

By the Court, CLINTON, J. An indictment for perjury must set forth "the substance of the offence," and that the matter sworn to and alleged to have been false, was material, must be shown by the pleading. There can be no materiality in the matter sworn to, unless it was pertinent to some trial or proceeding warranted by law, and the indictment must set forth such trial or proceeding. "A party claiming goods seized under an execution, made an affidavit stating that he had purchased and paid for them, and was indicted for perjury, but as the indictment did not state that any application had been made for an interpleader rule, it was holden bad, for it did not appear that any proceeding was pending to which the affidavit was applicable. So in other cases where the false oath is made in the course of a suit, the indictment must show that a suit was then depending; if it be preliminary to a suit, and in a matter of which the court has jurisdiction, the indictment must show it." (3 *Archbold Cr. L.*, 593, 594.)

Admitting that the notary had jurisdiction to administer the oath, and that the defendant is indictable, and indictable in a State court for perjury, in swearing to the protest, still the indictment is clearly bad, because it does not show any pending proceeding to which the protest was applicable, nor that the protest was preliminary to any suit or proceeding. It does not even show that there was any outstanding policy of insurance covering the loss. It avers that Watson, the owner, had "before that time" procured an insurance on the vessel, but it does not allege that the insurance was outstanding, nor that Watson had commenced or contemplated an action upon the policy, nor that the protest was made as parcel of the preliminary

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proofs required by the terms of the policy, or by the custom of merchants, nor that it was intended or could be used for any purpose whatever.

I might here dismiss this matter, but at the request of the parties I will give my opinion upon other and more important questions involved in this prosecution.

Assuming that perjury may be predicated of a "protest," the district attorney claims that the case falls within our statute of perjury. I do not think so. The general words of that statute must be restrained by general principles of law. The words include all perjuries committed in any territory, and before any tribunal or officer, provided the oath is lawfully required. The cases are very few in which a government punishes crimes committed out of its territorial jurisdiction; and a State never recognizes as a crime a breach of the laws of another State or jurisdiction. We, perforce, leave to the federal courts the vindication of the laws of the United States within our borders, and do not usurp the power to punish perjuries or robberies committed in Ohio. Crime is essentially local, and is defined and punished only by the law of the place where it was committed.

The notary public before whom the oath in question was taken, was one duly appointed in pursuance of the laws of this State, and acting within its territory. Our statute confers no authority upon a notary to administer an oath. It confers some powers and enumerates others derived from other sources. It declares that "notaries public" appointed under our law, "have authority to demand acceptance and payment of foreign bills of exchange," &c., "and to exercise such other powers and duties as by the law of nations, and according to commercial usage, or by the laws of any other State, government or country, may be performed by notaries public." (2 R. S., 283, §§ 44, 45.) Now, all this is simply declaratory and permissive. A notary public is an officer recognized by the law of nations. That law vests him with certain powers, and his seal is taken notice of by foreign courts. Our statute declares our notary public to be a notary public within the purview of

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the law of nations. Other States, governments and countries may, by law, vest certain powers in notaries public, in consideration of their public character, and the power of authentication attributed to their seals. A sister State may, for instance, confide to them the power of taking, within their theatres of action, proofs of conveyances to be recorded, and of instruments and depositions to be used in evidence within its territory. Our law says that our notary may exercise these powers; but they are powers conferred by and exercised under foreign laws.

The same remarks apply to the powers and duties which, "according to commercial usage," may be performed by notaries public. Our law permits our notaries to perform them. By commercial usage, this protest could be made before a notary public, and by the same usage, he could administer the oath and authenticate the protest; but our law did not require the oath, nor was it, under our law, "necessary for the prosecution or defence of any private right, or for the ends of public justice. (2 R. S., 681, § 1, *sub.* 2.) This subdivision of the statute definition of perjury, refers to a class or classes of cases widely different from this. But, if it be comprehensive enough to cover this case, then where is the evidence in the indictment of the existence of any private right or claim to the prosecution or defence of which the sworn protest could be applicable?

But such a protest is a purely voluntary act. The master may properly make it for the information of his owners, or the satisfaction of the underwriters, in case of a loss by perils of the sea. He cannot, however, be required to make it, nor can the owner, "by commercial usage," be required to procure it. If made, it forms a very proper portion of the preliminary proofs of loss. As a voluntary statement, whether sworn to or not, it may be important evidence against the master for the owner, or for the underwriter in the owner's action on the policy, but it is never, under our law, evidence for the owner against the insurer.

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I am of the opinion that the crime of perjury cannot, under our statute, be founded upon such a protest, and the district attorney is advised to enter a *nolle prosequi*.

Motion granted.

SUPERIOR COURT OF BUFFALO. December General Term, 1854.
Clinton, Verplank and Houghton, Justices.

THE PEOPLE v. BARNHARDT KRUMMER.

"I have bought of Barnhardt Krummer two frocks for \$7. Ask your employers for the money, and let him have it." (Signed) "Mrs. Williams."

B. K. was indicted for forging this instrument, and for uttering it to Samuel Williams, Jr., (a son of Samuel Williams,) as the act of his mother: *Held*, that the instrument, in connection with the extrinsic facts, was within the statute of forgery, and that an acquittal on the indictment on the merits, was a bar to a subsequent indictment for obtaining the money from S. W., Jr., by the false pretence that the instrument was true.

To constitute forgery of an instrument or writing, it is not necessary that the party in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it if genuine, or have a remedy over. It is the felonious making and uttering of a *false* instrument as *true in fact*, which constitutes the crime.

The same rule of pleading applies to criminal and to civil cases, that the party committing the first fault shall have judgment rendered against him.

Therefore, in the case stated of the indictment for false pretences, where the People demurred to the defendant's plea of a former acquittal, and it appeared that the indictment averred the money obtained to be the money of Samuel Williams (the father), but did not aver a balance due the son for wages, or show otherwise *how* it was his money: *Held* bad, and that, irrespective of the question of the sufficiency of the plea, the defendant was entitled to judgment.

DEMURRER to plea of former acquittal. The prisoner had been indicted in this court, and charged, *first*, with having forged an instrument in writing not directed to any person, which instrument was in these words:

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"I have bought of Barnhardt Krummer two frocks for \$7. Ask your employers for the money, and let him have it."
"MRS. WILLIAMS."

And, *secondly*, with having uttered such forged instrument as true, with intent to defraud Samuel Williams. He was tried and acquitted. He was afterwards indicted for having by false pretences, of which the representation of this instrument as true was the main ingredient, obtained \$7 of Samuel Williams, Jr. To this indictment he pleaded the former acquittal in bar, and the case came before the court on his joinder to the district attorney's demurrer to the plea.

A. Sawin (District Attorney), for the People.

— — —, for the defendant.

By the Court, CLINTON, J. The law distinguishes, defines, and names different offences. One definition cannot comprise two distinct offences. The uttering of forged paper for value, and with a felonious intention to defraud, cannot be the felonious obtaining of money or property by a false token or pretence. It may well be that the prisoner was acquitted upon the ground of a variance between the indictment and proof, or upon an exception to the form or substance of the indictment; and, if so, he may be indicted anew for the same offence, for nothing but an acquittal upon the merits and the facts, can shield him from a second indictment for the same crime. (2 R. S., 701, §§ 24, 25.) If the instrument is not within the statute of forgery, he never could have been legally liable for forgery in making or in uttering it, and whether acquitted or convicted upon such a charge, remains liable to the indictment before us. If the instrument was within the statute, he cannot, under any circumstances, be held liable, under the statute against cheats, for a fraud perpetrated by the use of it.

The English statutes name the instruments, the forgery of which they denounce. The better opinion seems to be that our statute was intended to include all the instruments so named,

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and all writings which, upon their face, were likely, if false, to defraud, in its sweeping definition. It includes every "instrument in writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be, or purport to be, created, increased, discharged or diminished, or by which any rights, or property whatever, shall be, or purport to be, transferred, conveyed, discharged, diminished, or in any manner affected," "by which false making, forging, altering, or counterfeiting, any person may be affected, bound, or in any way injured in his person or property."

We are never called upon to determine whether, in legal construction, the false instrument, or writing, is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money, or the delivery of property. The question is whether, upon its face, it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it; nor that the person to whom it is directed should be bound to act upon it if genuine, or have a remedy over. No man is bound to receive a bank bill in payment, and yet forging a bank bill is felony. So is forging a bill purporting to be of a bank which has, in fact, no existence. Though all the parties to a bill of exchange are purely fictitious, if it be passed as genuine, it is regarded by the law as a forgery. The law looks only to the falsity of the instrument, and the fraudulent use of it as genuine. But if I err in this, I err only to this extent: that though where the parties to it are fictitious, there can perhaps be no forgery of the instrument, yet still the felonious uttering of it as true must be within the statute. A married woman's request to her husband for money by the bearer may surely be forged; and so may an infant son's request to his father or guardian, for a remittance, or a coat.

I have no doubt that, upon its face, the instrument is within the statute. Mrs. Williams, whose act it purports to be, must

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be taken to be a natural person other than Barnhardt Krummer, the forger of it. It is not formally directed to any person, but, on its face, it is evidently intended to be presented to some person other than the drawer, or Krummer, the payee; it requests him to ask his employers for the money and let Krummer have it, and gives as the reason for the request, that she owes the money to Krummer for two frocks which she has not paid for. It is an order for the payment of money. Promissory notes, orders for the payment of money, bills of exchange and checks, have always been held to be within the statute, though they do not create, but merely evidence indebtedness. There a "pecuniary demand" was apparently "created," and whether it was justly, legally or effectually created, is a matter of indifference, so long as a third person could be affected, or in any way injured thereby in his person or property. It is evident that Mrs. Williams, and the person for presentation to whom the instrument was designed, might well be injured by the false making of it. Whether in fact it had been, or could be used to defraud either, must depend upon extrinsic circumstances not necessary to be pleaded.

The facts are that the Mrs. Williams intended by the signature, was, at the time of the forgery and of the uttering, the wife of one Samuel Williams, and the mother of one Samuel Williams, Jr., a minor, then at work for others for wages. The order was presented to the son, as the request of his mother, was capable of inducing him to honor it, and he did honor it. The fraud was perfected and injured the son or the father in his property. I cannot avoid the conclusion that the prisoner was liable to punishment, under our statute, for forging this paper, and for uttering it as true. He cannot, therefore, be liable to punishment for a distinct felony—that of obtaining money by uttering the paper and falsely pretending that it was true.

If my brothers should be of opinion that this paper is not within our statute of forgery, or deem it expedient to postpone passing upon the question directly raised by the demurrer, we may inquire into the sufficiency of the indictment

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before us, for I have no doubt that the rule that judgment on demurrer must be given against the party who commits the first substantial error in pleading, is applicable to criminal as well as to civil actions. The indictment charges that Krummer made the false writing in question (which averment is surplusage). The writing requests Samuel Williams, Jr., (who is shown by the indictment to be the minor son of Samuel Williams,) "to ask his employers to let him have the money, and give it to him." The indictment then avers that Krummer presented the writing as true to the son, representing that his mother had signed it, and wished him "to obtain seven dollars from his employers and give it to him;" and that the son, believing the representations, "did procure from his employers the said sum of seven dollars" "of the proper moneys, &c., of the said Samuel Williams" (the father), and that so the said Krummer did, feloniously and by these false pretences, obtain the said money, being the money of the said Samuel Williams. But the indictment does not show how the moneys so obtained were the property of Samuel Williams (granting that he was entitled to the earnings of his son), because it does not aver any indebtedness of the employers for such earnings. If the paper was false, and the payment was made on the credit of it by the employers, it was made to their own loss. It is not averred that the son was working for wages, nor that anything was due from them, and an authority from the father, to either the son or the mother, to borrow money for him, or from the father to the mother to authorize the son so to borrow, is not to be implied from their relations to each other, nor is it averred; and if the money was borrowed without such authority, it is not shown how it could be the property of the father. The facts averred show that the money, falsely obtained, was the property of the employers, and not of Samuel Williams, and I think that the indictment is therefore bad, and that the prisoner is entitled to judgment.

Judgment for the defendant.

SUPERIOR COURT OF BUFFALO. December General Term, 1854.
Houghton, Verplank and Clinton, Justices.

THE PEOPLE *v.* GEORGE HORTON.

It is no objection to an indictment that it was found while an investigation of the charge was pending before the committing magistrate.

There is no rule of practice making it imperative, in criminal cases, to put over the trial, upon affidavits of a prescribed form and substance.

Where an application is made by a defendant, in a criminal case, to postpone the trial, strict practice requires the prisoner to make in his affidavits a full disclosure of the names of his witnesses and the facts he expects to prove by them, though such strictness may well be waived by the District Attorney or by the court, on an application made at the term when the indictment is found; and where there is no appearance of ill faith, the court ought to grant a reasonable opportunity to supply defects and omissions in the affidavits before the decision upon the application.

The postponement of the trial of an indictment, on the application of the prisoner, is in no case a matter of legal right, but rests upon the discretion of the court. In resisting such a motion, the District Attorney may state facts touching the merits of the application; and the demeanor and conduct and conversation of the prisoner in the presence of the court, may properly be taken into consideration, and the minutes of the grand jury may be referred to for the purpose of ascertaining the materiality of the matters proposed to be proved by the absent witnesses.

In deciding upon such an application, the same credence cannot be given to the affidavit of a person indicted for felony, as to the uncontradicted affidavit of a party to a civil action.

THE prisoner was arrested upon a charge of grand larceny, upon a magistrate's warrant, and while standing committed for further examination, was indicted for the same crime at the Oyer and Terminer. On being arraigned in that court, he demanded a trial, and the indictment being sent to this court, he was tried and convicted two days after such arraignment. On a bill of exceptions he moved for a new trial. The grounds of the application are sufficiently stated in the opinion.

C. S. Macomber, for the prisoner.

A. Sawin (District Attorney), for the People.

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By the court, CLINTON, J. The motion to quash the indictment upon the ground that the investigation of the charge was still pending before the committing magistrate when the indictment was found, was frivolous. The grand jury has jurisdiction to inquire of and present all offences committed within the county. Had there been anything in the objection, the prisoner could have had advantage of it only before pleading.

His counsel requested the court to charge three several propositions of law, and "then and there excepted" to the refusal of the court. It is not necessary to pass upon all these propositions. It is sufficient to say that one of them is unsound. It is a well settled rule that the defendant can have no benefit of an exception to a general refusal to charge several propositions, unless the refusal is erroneous in every particular. Such an exception does not bring up the charge, and the presumption is that the charge was correct—that it, in effect, did cover the whole ground, and included and asserted all the sound propositions of law involved in the request of the prisoner, and applicable to the case made before the jury.

The material inquiry is whether there was irregularity or error in the refusal of the court to postpone the trial. The prisoner was arraigned in the Oyer and Terminer on the 27th, and tried in this court on the 29th of September. The defendant moved for a postponement upon his own affidavit, in the ordinary form, of the materiality of two witnesses—one Bennet, a resident of this State, and one Stanford, a resident of Minnesota—and set forth material facts which he expected to be able to prove by Stanford, but did not set forth any facts which he expected to be able to prove by Bennet, and swore that he believed he would be able to procure the attendance of Bennet and the testimony of Sanford at the next term of the court. The counsellor of the court, upon whose advice the affidavit was founded, swore that it was so founded, and that he believed the defendant could not safely proceed to trial without the benefit of the testimony of these witnesses. It may well be that these affidavits were, in some particular or

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particulars, wanting in fullness and precision, but we cannot hesitate to say that, under ordinary circumstances, they were sufficient to justify a delay of the trial.

A criminal court ought to proceed with the greatest caution, and even with tenderness, towards the accused. It is the guardian of his rights as well as of the rights of the people at large, and undue precipitancy is subversive of all safety, and tends to bring the tribunal into public contempt or hatred. But, on the other hand, in the exercise of its sad duties, a criminal court must be firm. It cannot for light causes jeopard the rights or interests of the public. It is informed by the indictment that evidence sufficient, in the opinion of the grand jury, to warrant a conviction of the prisoner, has been adduced before it; and where the District Attorney moves the cause for trial, the presumption is that that evidence is ready to be laid before the petit jury, and the court cannot, without good cause, grant a delay which may lead to a dispersion of the witnesses and the loss of material testimony. For the purposes of the application to postpone the trial, the presumption is that the prisoner is guilty, and that, if tried, he will be convicted; and, whatever may be the ordinary practice, I have no doubt that the strict rule requires the prisoner, in every case, to make a full disclosure of the names of his witnesses, and of the facts he expects to prove by them, though this strictness may very well be waived by the District Attorney or by the court, on application made at the term when the indictment is found. In such a case the affidavits should not be weighed with over-scrupulous particularity, and, where there is no appearance of ill faith in the motion, the court ought to grant all reasonable opportunity to correct and amplify them before a decision. In this case, it seems to me that the affidavits were substantially sufficient, and that opportunity ought to have been afforded to make them so, if the court deemed them wanting in fullness or precision. There is, however, no pretence that the refusal was founded upon the informality or *prima facie* insufficiency of the affidavits. It must have proceeded on other grounds, and I can imagine abundant reasons for it.

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I cannot recognize the doctrine that the prisoner has a legal right to demand a postponement of his trial, upon the strongest possible affidavits, though his trial be moved on the very day he is indicted. The court may still be called upon to exercise a discretion in the matter. The District Attorney, as a sworn officer of the court, and indifferent between the People and the prisoner, may state facts within his own knowledge, touching the merits of the application. The demeanor and conduct and conversation of the prisoner in the presence of the court, may well sway its decision. The minutes of the grand jury may disclose the fact that the matters expected to be proven by the absent witnesses, are wholly immaterial. It cannot give the same implicit credence to the affidavit of a person indicted before it for felony that it must repose in the uncontradicted affidavit of a party to a civil action. The disposition of the motion, whenever made, and though made upon uncontradicted affidavits, raises no question of law, unless the record show that the court decided, as a question of law, that a postponement could not be granted, or, as in the case of *The People v. Vermilyea* (7 Cow., 369), that the court decided that a witness was material, and that his absence was cause for a postponement, and then denied effect to its own decision, by requiring the prisoner to proceed forthwith to trial without the full benefit of the testimony of the witness. Here, then, is no error; and as there is no rule of practice making it imperative in criminal cases, to put over the trial upon an affidavit or affidavits of a prescribed form and substance, there has been no irregularity.

It is hardly necessary to add that we have no reason to believe that the discretion of the court below was exercised harshly or unwisely in the case of the prisoner.

New trial denied.

SUPERIOR COURT OF BUFFALO. June General Term, 1856. *Verplank, Masten and Clinton, Justices.*

THE PEOPLE *v.* EDWIN W. WESTON.

In an indictment against a constable for not executing a warrant delivered to him against a person charged with crime, it is necessary to show by averments that the justice who issued the warrant had jurisdiction.

It is not sufficient that the warrant set forth in the indictment recites all the facts necessary to confer the authority to issue it. It must be alleged in the indictment that those facts are true.

In pleading the judgments and proceedings of inferior courts of special and limited jurisdiction, a general averment of jurisdiction is not sufficient, but the facts on which it depends should be averred.

THIS was an appeal from a judgment of the Criminal Term overruling a demurrer to an indictment.

The pleadings were as follows:

State of New York, County of Erie, ss :

The Jurors of the People of the State of New York, in and for the body of the county of Erie aforesaid, upon their oaths, present:

That heretofore, to wit, on the thirty-first day of December, in the year 1855, at the city of Buffalo, in the county of Erie, Joseph Johnson, a justice of the county of Erie, issued his warrant under his hand, directed to any constable of the said county, which said warrant was to the effect following:

" Erie County, ss :

To any constable of the said county, *Greeting :*

Whereas, Martin H. Woodward has made complaint upon oath before me, Joseph Johnson, one of the justices of the peace of said county, that on the 31st day of December, 1855, certain personal property of the said Martin H. Woodward, to wit: one cutter of the value of ten dollars or upwards, was stolen and feloniously taken from his possession in the city of Buffalo, in the said county, and that he suspects that Wm.

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Pratt did steal and take the same aforesaid. Therefore, the People of the State of New York command you forthwith to apprehend the said Wm. Pratt, and bring him before me at my office in West Seneca, to be dealt with according to law.

Given under my hand at West Seneca, this 31st day of December, 1855.

JOSEPH JOHNSON, *Justice of the Peace.*

A more particular description of which said warrant is to the jurors aforesaid unknown, by reason of the same being lost, and delivered the same then and there to one Edwin W. Weston, a civil constable of the thirteenth ward of said city, to be by him executed; and thereupon it became the duty of the said Edwin W. Weston, he then and there having said warrant, as such constable as aforesaid, to arrest the said Wm. Pratt, by virtue of the warrant aforesaid, and carry him before the said Joseph Johnson, such justice of the peace as aforesaid, to be dealt with according to law; and that the said Edwin W. Weston, being then and there such constable, unlawfully and *corruptly* neglected his duty in that behalf, then and there unlawfully, willfully and corruptly, did refuse then and there to arrest and take the body of said Wm. Pratt, and carry him before said justice of the peace as aforesaid, as in said warrant commanded and as required by the law of the land, against the statute in such case made and provided, and against the People of the State of New York and their dignity.

ALBERT SAWIN, *District Attorney.*

SUPERIOR COURT.

The People	}
agst.	
Edwin W. Weston.	

And the said Weston, in his own proper person, comes into court here, and having heard the indictment read, says: That the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Weston is not bound by

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the law of the land to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient indictment in this behalf, said Weston prays judgment, and that by the court he may be dismissed and discharged from the premises in said indictment specified.

And Albert Sawin, who prosecutes for the said State in this behalf, says: That the said indictment, and the matters therein contained, in manner and form as the same are therein contained and set forth, are sufficient in law to compel the said Weston to answer the same; and this said Albert Sawin, who prosecutes as aforesaid, is ready to verify and prove the same as the court herein shall direct and award.

Wherefore, inasmuch as the said Weston hath not answered to the said indictment, nor hitherto in any manner denied the same, the said Albert Sawin, for the said State, prays judgment, and that the said Weston may be convicted of the premises in the indictment specified.

George W. Houghton, for the defendant.

The indictment is defective in not averring facts to give the justice jurisdiction to issue the warrant. It should have alleged that a complaint was made, an examination had, and that the justice was satisfied, &c. (2 *R. S.*, 706, §§ 2, 3.) If the justice had no jurisdiction to issue the warrant, the constable was not bound to execute it. (7 *Hill*, 538; 3 *Seld.*, 199; 15 *Barb.*, 153.)

The jurisdiction of a court of special and limited authority is not to be presumed. It must be averred and proved. (5 *Hill*, 39, 44; 4 *Seld.*, 254; 3 *Man. & Grang.*, 384; 42 *Eng. Com. L.*, 206; 1 *Comst.*, 40; 18 *Barb. R.*, 260.) It is error to suppose that justices of the peace have any other jurisdiction in criminal matters except that conferred by statute. (*Salkeld*, 406; 5 *Bac. Abr.*, 395, *Burns' Justice.*)

The offence is not charged in the indictment in the words of the statute, and therefore it must be considered as charging only a common law offence; in which case it is defective in

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not charging an intent to prevent the course of law and justice. (15 *Wend.*, 277.)

A. Sawin (District Attorney), for the People.

By the Court, CLINTON, J. The first objection to the indictment is, that it does not show that the justice of the peace who issued the warrant had jurisdiction to do so. The warrant which, it is claimed, recites the facts necessary to confer the power to issue it, is set forth in full. In *Bradstreet v. Ferguson* (23 *Wend.*, 688), which was an action of trespass against a magistrate for issuing a warrant for the plaintiff's arrest, under the act for the prevention of crime, the Court for the Correction of Errors held that a formal complaint in writing and upon oath was necessary to confer jurisdiction, but that the recitals in the warrant were *prima facie* proof of such complaint. In the words of Chancellor Walworth, delivering the opinion of the court: "A recital of a fact of this kind, in a warrant for the arrest of a party, when the magistrate would be guilty of a breach of his official oath if the recital was intentionally false, is presumptive evidence of the truth of such recital, and it lies upon the party denying the jurisdiction which depends on that fact, to show that the recital is false." This decision disposes of the mere question of evidence, but does not necessarily reach that of pleading. Assuming that the warrant recites all the facts necessary to confer the authority to issue it, the indictment does not aver those facts, but merely shows that the magistrate set them forth in the warrant as true. The People did not in their bill allege that they were true, nor has the grand jury, by finding the bill to be true, found that the magistrate had jurisdiction to issue this warrant.

Upon this question of pleading, I have no doubt. It is clear that in pleading the judgments or proceedings of inferior courts of special and limited jurisdiction, and of magistrates and officers acting under a statute or special authority, jurisdiction must be averred, and the only query has been whether it was sufficient to aver it in general terms; and that has been settled

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for many years in this State. A general averment of jurisdiction is not sufficient, but the facts upon which it depends must be averred. (*Turner v. Roby*, 3 Comst., 198.)

Justices of the peace were first instituted by 1 *Edw.*, 3, ch. 16. Before that there were conservators of the peace of two kinds: first, those who, by virtue of their office, had power to keep the peace, but were known only by their names of office; and, second, those who were constituted for that purpose only, and were simply called by the name of conservators or wardens of the peace. (*Bac. Abr.*) In *Yarrington's* case (*Salk.*, 406), it was said: "Their power is created by act of parliament within the time of memory; and they have no other authority than what is thereby given them." That they have no common law authority, has been repeatedly, and, I believe, uniformly held to be the law of this State. (*Way v. Carey*, 1 *Caines*, 191; *Wells v. Newkirk*, 1 *Johns. C.*, 20; *Bigelow v. Stearns*, 19 *Johns.*, 39.) This being so, it was necessary, in order to charge the defendant with a duty, as constable, to execute the warrant, to aver the facts which, and which alone, could confer authority upon the justice of the peace to issue it—that is, that a complaint was made before him, on oath, that the criminal offence had been committed, that he examined the complainant on oath, and found that there was cause to suspect the person named in the warrant as suspected of its commission, and therefore issued it. (2 *R. S.*, 3d ed., 798, §§ 2, 3.) If there were no such complaint, the magistrate had no jurisdiction, and the warrant was in fact void. If void for mere want of jurisdiction, I am of the opinion that the constable was not bound to execute it, although the law would have protected him for obeying it.

On this ground (which was not raised at the Criminal Term), I am of opinion that the defendant is entitled to judgment.

Judgment reversed, and judgment rendered for defendant.

SUPERIOR COURT OF BUFFALO. December General Term, 1856.

Masten, Verplank and Clinton, Justices.

THE PEOPLE v. CLINTON D. CHANDLER.

Where, on the trial of an indictment for obtaining property by false pretences, it appeared that certain bills purporting to have been issued by a foreign bank, had been transferred under certain representations alleged to be false, and the material questions to be decided were, whether there was any such bank in existence, and whether it was solvent, it was held not to be competent to prove by a broker that, in his opinion, bills of that description never had any value, the broker not having shown any knowledge on the subject, except that he had been for twelve years a money broker, had bought and sold bank bills, and in April or May previous had been offered and had refused to take bills of the description in question.

THE prisoner was convicted at the October Criminal Term, 1856, of having procured, by false representations, one of the firm of F. Smith & Co. to put the signature of F. Smith & Co. to their promissory note, payable to the order of one George W. Baker, and to procure said Baker's indorsement of the note, and to deliver it to the prisoner in exchange for certain bills purporting to be issued by the President, Directors and Company of the Potomac River Bank, dated at Georgetown, in the District of Columbia, and payable on demand to the bearer. The pretences set forth as false were as follows: "The said Clinton D. Chandler, with intent feloniously to cheat and defraud the said Frederick Smith, Addison P. Mason and Cornelius Smith" (F. Smith & Co.), did then and there feloniously, unlawfully, knowingly and designedly, falsely pretend and represent to the said Frederick Smith, that all of the aforesaid bills hereinbefore described were good; that he, the said Clinton D. Chandler, would sell all the property he had and take his pay in said bills; that in a published bank note and counterfeit detector (then and there presented to said Frederick Smith by said Clinton D. Chandler), said bills were quoted as good; that said bank was a good and solvent bank (then and thereby meaning that all of aforesaid bills were good and valuable pro-

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missory notes for the payment of money); that they were issued by an existing banking incorporation, and that said bank so existing then was a good and solvent bank." The traverse was as follows: "Whereas, in truth and in fact, there was not then and there any such corporation or bank as the Potomac River Bank, or the President, Directors and Company of the Potomac River Bank in existence, and had never been in existence, and he, the said Clinton D. Chandler, then and there well knew no such corporation or bank was in existence; and whereas, in truth and in fact, said bills, purporting to have been issued by the aforesaid bank hereinbefore described, were not good, and were not good and valuable promissory notes for the payment of money; and whereas, in truth and in fact, the said Potomac River Bank was not a good and solvent bank, and he, the said Clinton D. Chandler, then and there well knew," &c. On the trial Andrew Houlestone was called by the People, and testified that he was a money broker in Buffalo, and had been for twelve years; that he bought and sold bank bills; that bills of the Potomac River Bank were offered at his counter in April or May last, and that he refused them. The district attorney asked the witness: *In your opinion has this money (the Potomac River Bank bills) ever had any value?* The counsel for the prisoner objected to the inquiry, that it did not appear that the witness had any knowledge, either actual or acquired in his business, and that it was merely calling for his opinion. The objection was overruled, and the prisoner excepted. The witness answered, "In my opinion they never had." On a bill containing this and other exceptions, the prisoner moved for a new trial.

Eli Cook, for the prisoner.

A. Sawin (District Attorney), for the People.

By the Court, CLINTON, J. The fraud charged is not that the bills were falsely represented to be good or marketable in the city of Buffalo, but that they were falsely represented to

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be the bills of a good and solvent banking corporation, when, in truth, there was no such corporation, or, if there were, it was not good or solvent. Asking the witness Houlestone whether, in his opinion, the bills ever had any value, was, in effect, asking whether, in his opinion, there ever was any such bank, and if, in his opinion, there was such a bank, whether, in his opinion, it was ever solvent. I do not myself see how the non-existence of a corporation, or of a person, can ever be proven by opinion. The mere opinion of a witness is never evidence. The witness must, in the exceptional cases where opinion is competent, base it upon, or apply it to, a given fact or state of facts. If he is called to prove a signature of A. he must first prove his acquaintance with A's handwriting. If called to testify to the value of a barrel of flour, or a share of stock, he must prove his knowledge of the market. If to testify to the cause of B's death, he must show himself competent, by his profession and experience, and by a knowledge of the antecedents and accompaniments of the death, to form a reliable opinion as to its cause. Mr. Houlestone, having been a money broker in Buffalo for twelve years, buying and selling bank bills as parcel of his business, was competent to show that the bills purporting to be issued by the President, Directors and Company of the Potomac River Bank, were not current, and had no market value in Buffalo; but his opinion was utterly incompetent to prove there was no such bank, or that, if there were, its bills were actually, absolutely and everywhere destitute of value.

This was the only question presented by counsel on the argument, and I feel it proper to abstain from expressing my impressions as to the quality and sources of the evidence which may be necessary to sustain this indictment.

The prisoner is entitled to a new trial.

New trial ordered.

SUPERIOR COURT OF BUFFALO. December General Term, 1856.
Clinton, Verplank and Masten, Justices.

THE PEOPLE *v.* ALBERT K. McMURRAY.

Where, on a trial for larceny, it appeared that the property stolen had not come to the possession of the prisoner, but had been received by C. on the order of the prisoner, and there was evidence tending to prove that C. was a confederate with the prisoner in the transaction, but C. testified to his entire innocence, and the judge charged the jury that they were to determine whether C. was an innocent agent of the prisoner in taking the property, and that if they so found and found also a felonious intent on the part of the prisoner, they should find him guilty, but that if they should come to the conclusion that C. had a knowledge of the prisoner's felonious intent, then they should find the prisoner not guilty, on the ground that he was in that case only an accessory before the fact: *Held*, on review, that the charge was correct.

THE prisoner was convicted of grand larceny at the November Criminal Term, 1856, Clinton, J., presiding. The larceny was of a mare belonging to one La Duke, who, according to his own testimony, was a French Canadian, having a very imperfect knowledge of the English language. He testified that he had bargained with the prisoner to sell him the mare for \$600 in cash; that he went to one Westcott's stable to receive the money; that he there saw the prisoner, Westcott, and one Close; that the prisoner then told him the bank was closed, and paid him \$50, and gave him what was represented to be his check for \$550, payable the next morning; that he signed in two places what was represented to be a receipt for the \$50, he insisting that the mare was to remain in his possession until the next morning at ten o'clock; and that the papers were read to him by Westcott. The check was dated ten days ahead, and the prisoner had no funds with the bankers on which it was drawn. The two signatures were in fact made to a receipt for \$600 in full for the mare, and an order upon the tavern keeper in whose stable the witness had placed her, to deliver her "to the bearer, A. K. McMurray." The witness stated that Close drew the papers, and, in speaking of the false representations made to him, said, "they said." This testimony tended to im-

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plicate Close in the fraud. The witness, the prisoner Westcott, and Close, the papers being exchanged, went to a drinking place, and there the prisoner gave Close the order for the mare, and he went alone to the tavern keeper's stable, and, on exhibition of the order, procured her delivery to him, and took her to Westcott's stable. Close was examined as a witness for the People, and his testimony tended to exculpate himself from all knowledge of or participation in the fraud. The mare never came to the prisoner's possession in fact. On exceptions taken at the trial, a motion was made at the December General Term, 1856, for a new trial.

William Dorsheimer, for the prisoner, insisted that, as Close obtained possession of the mare, and the prisoner never had possession, the prisoner was liable, if at all, only as an accessory before the fact, and he made the following points:

I. An accessory before the fact is one who, being absent at the time of the felony committed, did yet procure, counsel or command another to commit it. But this rule is qualified by a principle which may be stated thus: Where a person of discretion makes an idiot, lunatic, or child of tender age, or a person entirely ignorant of the fact, the instrument of crime, the employer and not the innocent agent is answerable as a principal in the first degree. (3 *Greenl. Ev.*, § 9; *Regina v. Blearsdale*, 2 *Carr. & Kr.*, 768; 1 *Russell on Crimes*, 23; *Barbour's Crim. L.*, 281.)

II. Since every person is presumed to be conscious of his own acts, and to intend the natural consequences of them (3 *Greenl. Ev.*, § 14), the party seeking the application of the above qualification must be required to bring himself within the exception, and that by direct, positive, affirmative proof. This rule is carried into all classes of cases, and is stated in all the elementary treatises, and, it would seem, that it should be strictly enforced in a case where it is not pretended that the agent was insane, an idiot, or an infant of tender age, but where it appears that he took part in the preparation of the instruments used in accomplishing the crime.

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III. It is a general rule that the prosecutor must prove every fact and circumstance which is material and necessary to constitute the offence. (8 *Greenl. Ev.*, § 28.)

IV. The position of the defence is, that the evidence which proves the guilt of the prisoner proves the guilt of Close, and the evidence which proves the innocence of Close, establishes the prisoner's innocence.

Albert Sawin (District Attorney), for the People.

By the Court, CLINTON, J. At the close of the trial, I refused to charge, as matter of law, upon the evidence, that the indictment should have charged the prisoner as an accessory before the fact, to a larceny of the mare by the witness, Close. I also refused to decide that "the question as to whether Close was a guilty party, ought not to be submitted to the jury;" or, in other words, was a question for the court. I refused to decide "that, inasmuch as the evidence implicated Close, the prisoner ought not to be put upon his defence, in the absence of affirmative proof on the part of the People, of the innocence of Close;" or, in other words, I refused to adjudge him guilty as a principal. I did, "among other things, charge the jury that they were to determine, upon the evidence, whether or not the witness, Close, was an innocent agent of the prisoner in taking the horse; that if they so found, and if they further found a felonious intent upon the part of the prisoner," in the taking by Close, "he could be convicted on the indictment; but if they found that Close had a knowledge of the prisoner's said felonious intent, then their verdict should be not guilty." In this I can see no error prejudicial to the prisoner.

The argument of his able and zealous counsel assumes that Close was, upon the evidence and by some rule of law, presumptively guilty. No such presumption arises from the fact that Close presented a genuine order of La Duke, the owner of the mare, for its delivery, and received it on the order, and took it to Westcott's stable. If the order had been forged, the case would have been different. Under the finding of the jury

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it was void, because fraudulently procured by the prisoner, and Close could not be shown guilty in the taking, except by proving that when he presented the order and received the mare, he knew that the signature to the order was fraudulently procured, and this was most clearly a question for the jury.

La Duke's testimony tended to implicate both Close and Westcott as parties to the fraud. Close's testimony tended to exonerate himself. Westcott's tended to exonerate both himself and Close; and the conduct of both Westcott and Close, after the procurement of the mare by the latter, is consistent with honesty of intention. They kept her out of the prisoner's possession during the night, and Westcott restored her to La Duke in the morning.

The second point of the prisoner's counsel assumes either that Close is to be presumed guilty of the fraud, simply because he drew papers intrinsically honest, but the contents of which were fraudulently misrepresented to La Duke—a proposition too monstrous to require refutation; or simply because he presented the genuine order—a proposition which is equally monstrous. These circumstances, singly or conjointly, would have been utterly insufficient to carry the question of Close's guilt to the jury. To make them available in evidence against him, knowledge on his part of the proposed fraudulent use of the papers, and of the fraud itself, was necessary to be proven, and this could only be proven by his presence at the time of the fraudulent representations as to the contents of the papers, or by other circumstances. Surely the counsel would not require "direct, positive, affirmative proof" of innocence from a prisoner, whose guilt is not presumptively proven by a fact established by evidence in its nature indisputable, but where there is nothing but circumstantial evidence, given by witnesses whose accuracy in details as well as whose general credibility can be determined only by a jury.

The fourth point of the counsel for the prisoner confounds "evidence" with "witness." It is not true that the same evidence which proves the guilt or innocence of Close, establishes the guilt or innocence of the prisoner. The testimony of the

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witness La Duke tends to prove both participants in the fraud, which he swears was perpetrated upon him, but in very different degrees. If fully credited, it establishes the guilt of the prisoner, but only tends to establish that of Close.

A new trial should be denied.

Ordered accordingly.

SUPERIOR COURT OF BUFFALO. March General Term, 1857. *Clin-ton, Verplank and Masten, Justices.*

THE PEOPLE v. JAMES CAREY.

The conducting of a house in such a way as to disturb and disquiet the neighbors, or the carrying on of its business so as to tend to the corruption of public morals, is punishable as a nuisance.

It is no objection to an indictment for keeping a disorderly house, that it is charged in the same count that it is kept as a bawdy house, a tippling house, and a dancing house. It is not necessary, under such a count, to prove that all of such offences were committed, but the defendant should be convicted, if it is shown that either was permitted in such a manner and under such circumstances as to make the house disorderly and a nuisance.

MOTION for a new trial on a bill of exceptions. The defendant was convicted at the February criminal term, 1857, Mr. Justice Verplank presiding, of keeping a disorderly house. The indictment contained several counts, but the conviction was on the first one only. It charged that the defendant kept "a certain common, ill-governed and disorderly house, and in his said house, for his own lucre and gain, certain evil and ill-disposed persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together, then and on the said other days and times, there unlawfully and willfully did cause and procure; and the said men and women in his said house, at unlawful times, as well in the night as in the day time, and on the said other days and times, there to be and remain, drinking, tippling, dancing, whoring and mis-

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behaving themselves, unlawfully and willfully did permit, to the great damage and common nuisance of the People of the State of New York, and against the peace of the People of the State of New York and their dignity." There was no evidence that the house was a bawdy one, nor that the persons entertained there were thieves or gamblers.

The house was three stories high, and on a public street in the city, and the defendant kept it as a boarding house, and had from ten to twenty boarders. In the first story he had a bar where he sold strong liquors, and the house was frequented principally by sailors and canal boatmen. In the room in the rear of the bar he had free dances nearly every week-day evening, which was commenced early and kept up late. He kept four servant girls, who danced with the men who came to the house. The men came in their working clothes and stogy boots and shoes. The evidence tended to show that there was much drinking at the bar during the dances, and occasionally quarrelling and fighting in and in front of the house, and that the dances, as conducted, were noisy and disturbed the neighborhood, which was populous. The court refused to instruct the jury that there was no evidence to sustain the first count of the indictment, but charged the jury that they might convict him under that count, "if the evidence showed that the house was conducted in such a manner as to disturb and disquiet the neighbors, or if said business was so carried on that it tended to the corruption of the public morals." The defendant excepted to this refusal and charge.

Eli Cook, for the defendant.

A. Sawin (District Attorney), for the People.

By the Court, CLINTON, J. The count upon which the defendant was convicted is the old form of an indictment against the keeper of a disorderly house, and is given by Archbold in his Criminal Practice, as the proper form of indictment against the keeper of a bawdy house, with a slight difference

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as to the conduct in the house of the evil and ill-disposed persons procured to come together there. This count adds "dancing" to the "drinking, tippling, whoring and misbehaving themselves," which are charged in the form furnished by the books. It contains the essentials of the count given by Mr. Chitty, in his Criminal Law, as sufficient at common law to charge a dancing house as a nuisance; and of the form approved in Pennsylvania for charging a tippling house as a nuisance. (*The Commonwealth v. Stewart*, 1 Serg. & Rawle, 348.) The defendant's counsel seems to claim that the count is too broad, because it embodies distinct offences—the keeping of the house as a bawdy house, the keeping of it as a tippling house, and the keeping of it as a dancing house, to the nuisance of the public. But the law seems to make the keeping of a disorderly house, to the nuisance of the public, the offence, and leaves the pleader to state the acts done in it which make it a nuisance, as fully as he pleases. Were it otherwise, as a bawdy house is frequently a nuisance not only in that respect, but as a tippling house and a place where disorderly people are procured to come together, and dance and disturb the neighborhood by their noises, the keeper would be liable to several distinct punishments for his manner of keeping the house. "It is not necessary that the jury should find a man guilty of everything charged in the indictment. It is sufficient if they find him guilty of part, provided that part be an indictable offence." (*Hunter v. The Commonwealth*, 2 Serg. & Rawle, 298.) It was not necessary, then, to a conviction in this case, that the jury should find that whoring was permitted in the house, provided they found that tippling or dancing, or both, was permitted in such a manner and under such circumstances as to make the house disorderly and a nuisance.

The court properly declined to direct the jury to acquit the defendant upon the evidence. There was plenty of evidence that the house was kept as a common tippling house, and was frequented by disorderly persons, who, by their drunkenness, quarrelling and noisy dancing, disturbed and disquieted the neighborhood. The court, in leaving this evidence to the jury,

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very properly instructed them to convict the defendant if they should find "that the house was conducted in such a manner as to disturb and disquiet the neighbors, or if its business was so carried on as to tend to the corruption of the public morals." The decision in *Hunter v. The Commonwealth* (2 Serg. & Rawle), does not militate against the propriety of the first branch of this charge. The indictment there charged the keeping of a common tippling house, and the verdict was, "guilty of keeping a disorderly house and disturbing his neighbors." The court said: "The keeping of a disorderly house is not indictable, unless it be laid as a common nuisance, because a house may be disorderly without being injurious to any but its inhabitants; and it is the injury done to the public which is the essence of the offence." The verdict was, of course, held bad. But this charge does not go to the form of the verdict, but had reference solely to the question of guilt under the indictment. There can be no question at this day that the disturbance of a neighborhood by the noises of disorderly persons in a house, habitually permitted in a house, is a nuisance.

The motion should be denied, and the criminal term advised to proceed to sentence.

Ordered accordingly.

SUPERIOR COURT OF BUFFALO. May Criminal Term, 1858. *George W. Clinton*, Justice, presiding.

THE PEOPLE *v.* JOHN H. OSMER.

It is no defence to an indictment for forgery, in which the prisoner was charged, under 2 R. S., 672, § 30, with having made and engraved a plate in the form and similitude of a promissory note, issued by an incorporated bank, without the authority of such bank, that the lettering and vignettes of such plate were different from those of the genuine plate. Pictures, ornaments and devices form no part of the contract impressed upon the plate. Exact similitude is not required, even in the operative words of the instrument. It is enough that there be a sufficient resemblance, in connection with the other evidence, to satisfy the jury that the plate was intended to be used in striking off false bills, to be imposed on the public as true ones.

THE prisoner was indicted under 2 *Revised Statutes*, 672, section 30, for having "made and engraved a plate, in the form and similitude of a promissory note for five dollars," issued by the Marine Bank, a bank incorporated by the State of Rhode Island, "without the authority of said bank."

On behalf of the People, it was proved that the prisoner had procured an engraver to engrave on a steel plate, which had already engraved thereon vignettes at the side and top, the following words and letters, in the places they would have occupied in a genuine plate of a five dollar bill of The Marine Bank, viz.: "The Marine Bank," "Five Dollars," "Providence, R. I.," "A." A genuine five dollar bill of the bank was produced. In it the lettering of these words differed, in respect of shading and other slight particulars, from that of the false plate. In the genuine bill, too, "Rhode Island" was printed in full. The vignettes of the genuine bill were entirely different from those of the plate. The existence of the bank at the time these words and letters were engraved without its authority was admitted.

For the prisoner, it was contended that the plate, so far as finished, "must resemble and conform to" the similar parts of the genuine bank bill, and that the total dissimilitude of the

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vignettes was fatal, and that, if otherwise, the difference in the shading, &c., of the words and letters, was fatal. He therefore moved the court to direct the jury to acquit the prisoner.

James M. Humphrey (District Attorney), for the People.

Perry G. Parker, for the prisoner.

The decision of the court was substantially as follows :

CLINTON, J. If the position of the prisoner's counsel is correct, the statute, so far as it seeks to punish the forgery of bank plates, is a nullity. By making the false plate vary from the true in some unimportant matter of ornament, the making of false plates, impressions from which might be freely passed, would be innocent, while the uttering of the impressions would be criminal. This position is, however, erroneous. The sections in question are carefully drawn, and it is, perhaps, only to be regretted that they were not so drawn as clearly to include all plates in imitation of bank bills, &c., whether the bank named in the plate exists or not. The mistake of the counsel is in supposing that the crime consists in making a plate in imitation of a genuine bank plate, while the statute (§ 30) expressly defines it to be the false making of "any plate in the form or similitude of any promissory note, bill of exchange, draft, check, certificate of deposit, or other evidence of debt, issued by any incorporated bank." The next section (§ 31) declares that "every plate specified in the last section shall be deemed to be in the form and similitude of the genuine *instrument* imitated, in either of the following cases: 1. When the engraving on such plate resembles and conforms to such parts of the genuine *instrument* imitated as are engraved; or, 2. When such plate shall be partly finished, and the part so finished resembles and conforms to the similar parts of the genuine *instrument*." The word *instrument*, wherever it occurs in section 31, is used as inclusive of the several kinds of *instrument* named in section 30. The bill of exchange, or pro-

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missory note, or check, &c., in the eye of the law, consists, as an instrument, only in the words and figures which, if imprinted by the authority of the bank, would make it binding upon the bank as a contract. Hence, it has been uniformly held, in this State, that, in an indictment for forging a promissory note, whether of a bank or a natural person, it is unnecessary to describe or imitate the pictures or devices put upon it, in imitation of those used in the genuine note for ornament or distinction. Such pictures, ornaments and devices, though they form parts, and often very important parts of a bank plate, are no part of the instrument or contract impressed by the plate.

The operative words engraved on the plate, or finished part of the plate, must, indeed, "resemble and conform to the similar parts of the genuine instrument;" but this resemblance and conformity is not exact similitude of appearance and position. Here the words engraved on the false plate conform in position to those in the genuine bill, and resemble them sufficiently, in connection with the other evidence, to raise the question for the jury whether the plate was intended, when finished, to be used in striking off false bills, to be imposed on the public as true ones. The motion must be denied.

The jury, without leaving their seats, found the prisoner guilty, and he was sentenced to be imprisoned in the State Prison at Auburn for the term of ten years.

SUPERIOR COURT OF BUFFALO. January Criminal Term, 1858.
George W. Clinton, Justice, presiding.

THE PEOPLE v. HENRY BRADLEY.

A simple receipt is not the subject of larceny under the statute; otherwise of an "accountable receipt."

A note, though payable in specific articles, is the subject of larceny within the statutory definition.

THE indictment contained one count only, and charged the prisoner with larceny of "one promissory note of the value of \$100," and of certain receipts, and of a tin box of the value of \$2, "of the chattels and personal property of one Edwin W. Weston." The note and receipts were set forth in *hæc verba*. The note was as follows: "On or before the first day of March next, I promise to deliver A. Lainey, or bearer, one hundred dollars' worth of hemlock lumber, at Martin's Corners, at the wholesale prices, it being half payment of the \$200 mentioned in a certain mortgage this day executed in favor of said Lainey mentioned, money down, for which said Lainey agrees to take lumber instead of money," and was dated January 21, 1854. The form of describing the several receipts was as follows: "One receipt for the payment of the sum of fifteen dollars and forty-six cents, and of the value of fifteen dollars and forty-six cents, which said receipt was in the words and figures following, to wit: "Buffalo, Mch. 3d, 1855. Received from Mr. E. W. Weston, Fifteen $1\frac{4}{5}$ dollars in full for bill lumber, and of all demands to date." (signed) "Dart Brothers."

A jury having been impaneled, *Galusha Parsons*, who had been assigned to defend the prisoner, requested the court to decide that no evidence could be given of the larceny of the so called promissory note, nor of the receipts, for reasons noticed in the following opinion. After hearing *James M. Humphrey* (District Attorney), the court, with the consent of counsel, permitted the evidence to be given, reserving its decision until the following morning, and then delivered the following opinion:

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CLINTON, J. At common law, no chose in action, evidence of debt, or voucher of payment, was the subject of larceny, but under our statutes the common law definition of that crime has been greatly expanded. The Revised Statutes (2 *R. S.*, 679, § 63) define grand larceny to be "the felonious stealing, taking and carrying away the personal property of another, of the value of more than twenty-five dollars;" and (*Ib.*, 690, § 1) petit larceny, as the "stealing, taking and carrying away the personal property of another, of the value of twenty-five dollars or under." The section of those statutes (*Ib.*, 679, § 66) cited by the prisoner's counsel last evening, does not, as he supposed, define the subjects of larceny other than goods or chattels, but merely fixes, by arbitrary rules, their values. The definition is furnished by another section (*Ib.*, 702, § 33), which is as follows: "The term 'personal property,' as used in this chapter, shall be construed to mean goods, chattels, effects, evidences of right in action, and all written instruments by which any pecuniary obligations, or any right or title to property, real or personal, shall be created, acknowledged, transferred, increased, defeated, discharged or diminished." This definition and the definitions of larceny, grand and petit, are in the same chapter; and larceny, under our Revised Statutes, includes the stealing, taking and carrying away of any written instrument, by which any pecuniary obligation is discharged or diminished. A release of the whole, or of a part of a pecuniary obligation (or debt, as we understand the term), does discharge or diminish it; but a simple receipt does not. Payment, partial or in full, does; and the receipt is a mere written acknowledgment and evidence of the payment. A simple receipt is not a written instrument in the ordinary legal acception of that word. It has no active operation, but is simply evidence. It is not capable of enforcement, but is a shield. As before remarked, the provision cited by counsel (§ 66) does not profess, and cannot be permitted, to enlarge this definition. It uses the word "receipt," but that word is used in various senses, both in common and commercial parlance, and in the law. The section, as respects receipts,

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reads thus: "If the property stolen consist of any receipt, or any other evidence of debt, the money due thereon or secured thereby, and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected thereby, as the case may be, shall be deemed the value of the article so stolen." There is nothing in this language which can be applied to a creditor's written acknowledgment of payment by his debtor. Such an acknowledgment, or receipt, is not an evidence of debt; no money is due thereon, nor can, in any contingency, be collected thereon, nor is any property transferred or affected thereby. But there are receipts known to commerce and the law which are the subjects of larceny under our statutory definition. Such are "accountable receipts," or receipts for money to be accounted for; receipts for property in store, and ship receipts. A ship receipt is the written acknowledgment of the mate receiving cargo, acknowledging the receipt of goods on board the vessel, describing them by the marks upon them or the packages. In delivering the judgment of the Court of Appeals, in *Brower v. Peabody* (3 Kern., 121), Gardiner, Ch. J., sanctioned the distinction we recognize. Speaking of ship receipts, he said: "The act of Lovett, through which the defendant is compelled to make title, was a felony, for which he could have been indicted and convicted, under the 66th section of the article 'Of robbery, embezzlement and larceny.' If the custom or usage which lies at the foundation of the defence, is valid, the receipts were property, and the value of the commodity affected or transferable by the instrument would be deemed the value of the article so stolen."

But, while we are of opinion that the receipts set forth in the indictment are not subjects of larceny, we are very clear that the note payable in lumber is. Though it is not negotiable, it is still "a promissory note." Not being within the statute, it is a mere contract, and a consideration to support it, if one be not apparent on its face, could not be presumed; and it would, perhaps, have been the duty of the district attorney, in that case, to show, by the averment of a consideration, that

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it was property within the meaning of the statutory definition. But it shows a consideration on its face. It is expressed to be in half payment of an admitted debt of \$200.

Being payable to Lainey or bearer, it was transferable by Lainey by mere delivery. Indeed, being a mere chose in action, if the words "or bearer" had been omitted, it would still have been so transferable. But a written assignment of it by Lainey to Weston has been proven. The prisoner's counsel objects that no such transfer or assignment is averred in the indictment. That merely avers that it was the property of Weston when stolen. He also claims that the indictment is defective, because it does not, in reference to this note or contract, aver, in the words of section 66, that a demand was created thereby, not that the demand was unsatisfied at the time of the taking by the prisoner. A recurrence to the decisions as to the form of indictments for stealing bank notes, sufficiently shows that, in the opinion of this court, the enlargement of the definition of larceny by substituting "personal property" for "goods and chattels," was not intended further to change or complicate the simple form of an indictment at the common law. If the indictment shows that the note, bill, receipt, or instrument alleged to have been stolen was personal property, and avers that it was the personal property of a person named, or to the jurors unknown, it is sufficient.

SUPERIOR COURT OF BUFFALO. December Criminal Term, 1856.
George W. Clinton, Justice, presiding.

THE PEOPLE *v.* WILLIAMS AND WHITE.

In an indictment for uttering and circulating as money foreign bank bills, and for receiving such bills with intent to circulate them, contrary to the provisions of section 2 of the act of May 7, 1839, as amended April 13, 1853, it is not sufficient to describe the defendants as officers of a bank or banking association, and then simply to charge that they did the acts complained of. It is necessary to allege a violation of the statute by the bank or association and that the defendants acted as such officers in doing the acts in question. As individuals, the defendants are not liable, unless they are "authorized to carry on the business of banking in this State," and where the intent is to charge them as such, an allegation bringing them within section 2 of the act of 1853 should be made in the indictment.

THE indictment contained two counts. The first count charged that, on the first day of January, 1854, the defendant, Williams, was the cashier, and the defendant, White, the president of a banking association, organized under the act "to authorize the business of banking," and known as and called the White's Bank of Buffalo; "and that said White, being such president, and said Williams, being such cashier of said White's Bank of Buffalo, as aforesaid, *on the said* first day of January, 1852, at," &c., "unlawfully," &c., "did utter and circulate as money, and did aid and assist in the uttering and circulating as money," within the city of Buffalo, "one thousand different promissory notes, in the similitude of bank bills, purporting to have been issued by an association situated without the State of New York, to wit: at Toronto, in the Province of Upper Canada, called the Farmers' Joint Stock Banking Company, purporting to be signed by J. W. Sherwood, as president thereof, for the payment to the bearer on demand for divers different amounts and sums of money, a more particular description of which was to the jurors aforesaid unknown, and of the amount in the whole of \$10,000." It then charged that "the aforesaid notes" "had not then and there, or before that time, been received by said White's Bank of Buffalo, at par, in

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the ordinary course of the business of said White's Bank of Buffalo, contrary to the form of the statute," &c. The second count in like manner charged that, on the first day of January, 1853, the defendants were the president and cashier of the said White's Bank of Buffalo, a banking association, &c., and that, being such president and such cashier, on the first day of January, 1853, they "did unlawfully receive from some person or persons to the jurors aforesaid unknown, one thousand different bank bills, purporting to have been issued by an association situated out of the State, to wit: at Toronto, in the Province of Upper Canada, and purporting to be signed by J. W. Sherwood, as president thereof, for the payment of the sum of one dollar each bill to the bearer thereof on demand," and other similar bills of the denomination of \$2, \$3 and \$5, "with the intent to utter and circulate, and with the intent to aid and assist in uttering and circulating" them as money within this State; "and that said bank bills had not been received by said White's Bank of Buffalo from its customers in the regular and usual course of its business, at a rate of discount not exceeding one-quarter of one per cent, against the form of the statute, &c. The defendants pleaded not guilty. The indictment came on to be tried, and a jury, for the trial thereof, was impaneled at the criminal term, on the 22d day of December, 1856, Mr. Justice *Clinton* presiding. After the district attorney had opened for the People, he consenting, the counsel for the defendants, Mr. Henry W. Rogers, moved the court to instruct the jury to acquit them, upon the ground that the indictment was substantially defective in certain particulars. After hearing Mr. Sawin (District Attorney), for the People, the court, the usual time for adjournment having arrived, adjourned for the day, and the next morning delivered its opinion as follows:

CLINTON, J. By section 1 of the act of April 13, 1853, amending the act of May 7, 1839, "concerning foreign bank notes," a new section 2 was substituted for section 2 of the original act. The new section declares that "it shall not be lawful for any incorporated banking institution within this

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State, or any association, or any individual or individuals authorized to carry on the business of banking, by virtue of the act entitled 'An act to authorize the business of banking,' &c., "to procure or receive any bank bill or note, or other evidence of debt in the similitude of a bank note, issued, or purporting to be issued, by any corporation, association or individual situated or residing without this State, at a greater rate of discount," &c.; and that it shall not be lawful "for any banking institution, association, or individual or individuals," in the first part of the section mentioned, to issue, utter, or circulate as money, or in any way to aid or assist in the issuing, uttering or circulating as money, within this State, of any such bank bill, note, or other evidence of debt, issued, or purporting to have been issued by any "foreign corporation, association or non-resident individual, or to procure or receive any such bank bill, note or evidence of debt, with intent to issue, utter or circulate, or to aid or assist in issuing, uttering or circulating them as money within this State." The section contains a proviso that it shall not be construed to prohibit such banks, &c., from receiving and paying out such foreign bank bills as they shall receive at par in the ordinary course of their business.

By section 8 of the act of 1839, it is made unlawful for incorporated banks and associations, and individuals, authorized to carry on the business of banking under the act "to authorize the business of banking, to lend or pay out for paper discounted or purchased by them, any bank bill, note or other evidence of debt, which is not received at par by it or him."

Section 4 of that act imposes upon "every corporation, and every association and individual authorized to carry on the business of banking, who shall offend against any of the provisions of the previous sections of this act," a penalty of \$1,000 for each and every offence, to be recovered by any person who shall prosecute therefor; and makes it a misdemeanor in any officer or clerk of any such bank or association, or in any individual banker, or his clerk or servant, "knowingly to act or assist in any violation of any provision of this act."

It is very plain that the officers of a bank or banking asso-

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ciation are guilty of a misdemeanor, under section 2, only when they act or aid in the violation of that section by the bank or association. Neither count of this indictment charges any violation of this section by White's Bank of Buffalo. The defendants are described as officers of the association, but are not charged with doing any act as such officers. They are charged with the doing of acts, which, if they were at the time individuals doing business under the "act to authorize the business of banking," would subject them both to the penalty of \$1,000, and to punishment for the misdemeanor, but they are not averred to have been individuals doing business under that act when they did the things set forth in the indictment. As an indictment then, under section 2 of the act of 1889, as amended in 1853, this indictment is fatally defective.

Section 2 of the act of 1853, apparently makes the acts touching the circulation of foreign bank notes by banks, banking associations and individual bankers, forbidden by its section 1, unlawful "for any person within this State," if the foreign bank bill, note or other evidence of debt in the similitude of a bank bill or note, "shall have been received by such person at a greater rate of discount than is or shall be at the time fixed by law for the redemption of the bills of the banks of this State at their agencies." Possibly this indictment might have been sustained under this section, had it charged, which it does not in either count, that the defendants had received the bank bills or notes at a greater rate of discount, &c.

Section 3 of the act of 1853, provides that "the penalties provided in section 4 of the act hereby amended, shall apply to any violation of this act." From the best examination we have been able to give this subject, we doubt very much whether the misdemeanors declared by section 4 of the amended act are tolled. But it is not necessary to pass upon this question, nor upon any of the minor objections to the indictment. The first ground taken by the counsel for the defendants is fatal. The indictment being for a misdemeanor, we think it right to direct the jury to bring in a verdict for the defendants, instead of quashing the indictment

SUPERIOR COURT OF BUFFALO. February Criminal Term, 1858.
George W. Clinton, Justice, presiding.

THE PEOPLE *v.* WILLIAM G. ROWE.

It is no ground, either for quashing an indictment or discharging the prisoner from arrest, that before the finding of the indictment, and after the issuing to the officer, by a police justice, of a warrant for his arrest, by an agreement between the officer and some person in Canada, the prisoner was forcibly brought from Canada to the line of this State, and there delivered to such officer, in arrest, under the warrant.

A WARRANT was issued by the police justice of the city of Buffalo to arrest the prisoner upon a charge of grand larceny, and delivered to a deputy sheriff of Erie county for service. The prisoner being in Canada, the deputy sheriff made an arrangement with some person or police officer in Canada to bring the prisoner to this side. Such person took the prisoner by the arm, at or on the Suspension Bridge, on the Canadian side, and forced him across the bridge into this State, the deputy sheriff accompanying him, and, at this end of the bridge, the deputy arrested the prisoner under the warrant, and took him before the police justice, who, on proof of these facts, refused to discharge him, and, after examination, committed him to answer the charge. He was indicted for the larceny at this term of the court, and, upon affidavits showing these facts, moved that the indictment be quashed, or he discharged from arrest.

A. Sawin, for the prisoner.

J. M. Humphrey (District Attorney), for the People.

CLINTON, J. The objection to the arrest has no application to the indictment. For aught that appears in the papers, that could and would have been found whether the defendant was within the jurisdiction or not. There is no reason shown for quashing the indictment.

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As to the arrest, it was undoubtedly the fruit of an agreement for a violation of the prisoner's right of personal liberty on Canadian soil. For that he has, we presume, a remedy in the Canadian courts, and, perhaps, in our own. Whether the dignity of Great Britain has been insulted by the act of its subject in hurrying the prisoner across the Suspension Bridge from a part of her Majesty's dominions, we are not called upon to inquire. The question is an international one, and cannot arise unless her Majesty's government shall see fit to lay the matter before our government. If the Canadian law has been violated, one of the offenders, and perhaps the only offender, against that law, is within its reach. No offence against the laws of this State, nor of the United States, was, so far as we can discover, perpetrated by the arrest.

We see no analogy between this case and cases of arrest in civil actions procured by the trick or fraud of the plaintiff. Where the defendant is so induced by the plaintiff to come within the jurisdiction, the court may discharge him without bail. Here is no wrong chargeable to the People. On the other hand, the indictment is, on such a motion as this, conclusive evidence of the prisoner's guilt, and the court would be guilty of a gross injury to the People if it should discharge him untried.

The motion is denied.

SUPERIOR COURT OF BUFFALO. March General Term, 1859. *Clinton, Verplank and Masten*, Justices.

THE PEOPLE *v.* JOHN P. SMITH.

Cattle, stolen in Wyoming county, were driven across the line into Erie county, and through different towns of the latter county into the city of Buffalo: *Held*, that the Superior Court of Buffalo had jurisdiction for the trial of the offence.

THE prisoner was convicted, at the October criminal term, 1858, of grand larceny. He moved for a new trial, on a bill of exceptions, at the May general term, 1859.

W. C. Johnson, for the prisoner.

J. M. Humphrey (District Attorney), for the People

By the Court, CLINTON, J. The bill of exceptions shows that the prisoner stole cattle in Wyoming county, drove them across the line into Erie county, and thence through divers towns of Erie county into this city, its capital. The criminal jurisdiction of this court is limited, thus: "1. To inquire by grand jury of all crimes and public offences committed in the city of Buffalo. 2. To try and determine all indictments found therein or sent thereto by another court, for any crime or offence committed in the city of Buffalo." The counsel for the prisoner ingeniously contends that the crime was not committed in the city of Buffalo, although he admits that it was committed in the county of Erie, as well as in the county of Wyoming. His notion appears to be, that the common law makes a distinction between a county and a local criminal jurisdiction within a county, and that the thief who brings the property, stolen in one county, into a local criminal jurisdiction within another county, though indictable in the latter county, is not indictable in the criminal courts of the local jurisdiction. But he has not produced any authority for this

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distinction, and we are unable to discover any foundation for it in the theory of a continuing trespass, upon which the common law rule is grounded.

A new trial must be denied.

ALBANY OYER AND TERMINER. January, 1859. Before *Harris*, Justice of the Supreme Court, and the Justices of the Sessions.

THE PEOPLE *v.* MARY HARTUNG.

Form of an indictment for murder by poisoning, against M. H., as principal, and W. R., as accessory before the fact, with counts at common law and under the statute.

Circumstantial evidences of guilt on trial of an indictment for murder by poisoning. Appearances of stomach and intestines, on *post mortem* examination, in case of poisoning, described, with opinions of scientific men on the subject.

Charge of the presiding judge on a trial at the Oyer and Terminer, in a case of alleged murder by poisoning.

It is a reprehensible irregularity for a jury, after they have retired to deliberate on a trial for murder, to take the opinions of the constable in attendance, on the question whether the jury could bring in a verdict of manslaughter, and to send for the Revised Statutes and examine their provisions in relation to the crimes of murder and manslaughter.

Such an irregularity is sufficient to vitiate a verdict of "guilty," unless it appears beyond all reasonable doubt that no injury has resulted from it to the prisoner. The evidence of jurors is not to be allowed for the purpose of impeaching or in any way impairing the effect of their verdict.

It seems, there is no rule which prevents the constable, sworn to attend the jury, from being present in the jury room during the deliberations and discussions of the jury, though the practice is disapproved.

THE following indictment had been found against Mary Hartung as principal, and William Reimann as accessory before the fact:

City and County of Albany, ss:

The jurors for the People of the State of New York, in and for the body of the city and county of Albany, being then and there sworn and charged upon their oath, present:

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That Mary Hartung, late of the city of Albany, in the county of Albany aforesaid, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, wickedly contriving and intending one Emil Hartung, the husband of the said Mary Hartung, with poison, willfully, feloniously, and of her malice aforethought, to kill and murder, on the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, with force and arms, at the city of Albany, in the county of Albany aforesaid, feloniously, willfully, and of her malice aforethought, did convey and have into the dwelling house of said Emil Hartung, there situate, a great quantity of white arsenic, to wit, ten drachms of white arsenic, being a deadly poison, and that the said Mary Hartung, afterwards, to wit, on the same day and year and place aforesaid, the said white arsenic in the said house then and there being, then and there feloniously, willfully, and of her malice aforethought, with the intent aforesaid, did put into, mix and mingle with certain water, gruel, beer and soup, and certain other substances to the jurors aforesaid unknown, the said Mary Hartung then and there knowing the said white arsenic to be deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year aforesaid, at the city of Albany, in the county of Albany aforesaid, willfully, feloniously, and of her malice aforethought, did take, give, administer and deliver to the said Emil Hartung, the said white arsenic, so put into, mixed and mingled in manner and form aforesaid, with the intent that he, the said Emil Hartung, should take, drink and swallow down the same into his body, the said Mary Hartung then and there well knowing the said white arsenic to be a deadly poison, and the said white arsenic so taken, given, administered and delivered to the said Emil Hartung, by the said Mary Hartung, in manner and form as aforesaid, the said Emil Hartung did take, drink and swallow down into his body, he, the said Emil Hartung, not knowing that there was any white arsenic, or other poisonous ingredient put into, mixed and mingled with the said water, gruel, beer and soup aforesaid, and substances as afore-

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said, by means whereof the said Emil Hartung became and was mortally sick and distempered in his body ; and the said Emil Hartung, of the poison aforesaid, so by him taken, drank and swallowed down into his body as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the said tenth day of April, in the year aforesaid, until the twenty-first day of April, in the year aforesaid, at the city of Albany and county of Albany aforesaid, did languish, and languishing did live, on which said twenty-first day of April in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, the said Emil Hartung, of the poison aforesaid, so given, administered and delivered, taken, drank and swallowed down as aforesaid, and of the said mortal sickness and distemper occasioned thereby, died. And so the jurors aforesaid do say, that the said Mary Hartung, in manner and form aforesaid, him, the said Emil Hartung, feloniously, willfully, and of her malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That William Reimann, late of the city of Albany, in the county of Albany aforesaid, laborer, before the said felony and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit: On the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, at the city of Albany, in the county of Albany aforesaid, was accessory thereto before the fact; and then and there feloniously and willfully, and of his malice aforethought, did counsel, hire, advise, command and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Mary Hartung, willfully contriving and intending said Emil Hartung, with poison, willfully, feloniously, and from a premeditated design to effect the death of

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said Emil Hartung, to kill and murder, on the said tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, with force and arms, at the city of Albany, in the county of Albany aforesaid, feloniously, willfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did convey and have into the house of said Emil Hartung, there situate, a great quantity of white arsenic, to wit, ten drachms of white arsenic, being a deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year, and place aforesaid, the said white arsenic in the said house then and there being, then and there feloniously, willfully, and from a premeditated design to effect the death of him, the said Emil Hartung, and with the intent aforesaid, did put into, mix and mingle with certain water, gruel, beer and soup, and certain other substances to the jurors aforesaid unknown, the said Mary Hartung then and there well knowing the said white arsenic to be a deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year aforesaid, at the city of Albany, in the county of Albany aforesaid, willfully, feloniously, and from a premeditated design to effect the death of the said Emil Hartung, did take, give, administer and deliver to the said Emil Hartung the said white arsenic so put into, mixed and mingled, in manner and form aforesaid, with the intent that he, the said Emil Hartung, should take, drink and swallow down the same into his body; the said Mary Hartung then and there well knowing the said white arsenic to be a deadly poison, and the said white arsenic so taken, given, administered and delivered to the said Emil Hartung by the said Mary Hartung, in manner and form as aforesaid, the said Emil Hartung did take, drink and swallow down into his body, he, the said Emil Hartung, not knowing that there was any white arsenic or other poisonous ingredients put into, mixed and mingled with the said water, gruel, beer and soup and substances as aforesaid, by means whereof the said Emil Hartung became and was mortally sick and dis-tempered in his body; and the said Emil Hartung, of the poison aforesaid so by him taken, drank and swallowed down

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into his body as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the said tenth day of April, in the year aforesaid, until the twenty-first day of April in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, did languish, and languishing did live, on which said twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, the said Emil Hartung of the poison aforesaid so given, administered and delivered, taken, drank and swallowed down as aforesaid, and of the said mortal sickness and distemper occasioned thereby, died. And so the jurors aforesaid, upon their oath aforesaid, do say, the said Mary Hartung, in manner and form aforesaid, him, the said Emil Hartung, feloniously, willfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said William Reimann, before the said felony and murder was committed in manner and form aforesaid, by the said Mary Hartung, to wit: on the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, at the city of Albany, in the county of Albany aforesaid, was accessory thereto before the fact, and then and there feloniously, willfully, and from a premeditated design to effect the death of the said Emil Hartung, did counsel, advise, command and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Mary Hartung, willfully contriving and intending said Emil Hartung with poison, willfully, feloniously, and of her malice aforethought, to kill and murder, on the said tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, with force and arms, at the

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city of Albany, in the county of Albany aforesaid, feloniously, willfully, and of her malice aforethought, did convey and have into the dwelling-house of said Emil Hartung there situate, a great quantity of the sulphuret of arsenic, to wit, ten drachms of the sulphuret of arsenic, being a deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year and place aforesaid, the said sulphuret of arsenic in the said house then and there being, then and there feloniously, willfully, and of her malice aforethought, with the intent aforesaid, did put into, mix and mingle with certain water, gruel, beer and soup, and certain other substances to the jurors aforesaid unknown, the said Mary Hartung, then and there well knowing the said sulphuret of arsenic to be a deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year aforesaid, at the city of Albany, in the county of Albany aforesaid, willfully, feloniously, and of her malice aforethought, did take, give, administer and deliver to the said Emil Hartung, the said sulphuret of arsenic, so put into, mixed and mingled, in manner and form aforesaid, with intent that he, the said Emil Hartung, should take, drink and swallow down the same into his body, the said Mary Hartung then and there well knowing the said sulphuret of arsenic to be a deadly poison, and the said sulphuret of arsenic so taken, given, administered and delivered to the said Emil Hartung by the said Mary Hartung in manner and form aforesaid, the said Emil Hartung did take, drink and swallow down into his body, he, the said Emil Hartung, not knowing that there was any sulphuret of arsenic or other poisonous ingredient put into, mixed and mingled with the said water, gruel, beer and soup aforesaid, and substances as aforesaid, by means whereof the said Emil Hartung became and was mortally sick and distempered in his body, and the said Emil Hartung, of the poison aforesaid, so by him taken, drank and swallowed down into his body as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the said tenth day of April, in the year aforesaid, until the twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany afore-

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said, did languish, and languishing did live, on which said twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, the said Emil Hartung, of the poison aforesaid so given, administered and delivered, taken, drank and swallowed down as aforesaid, and of the said mortal sickness and distemper occasioned thereby, died. And the jurors aforesaid, upon their oath aforesaid, do say, that the said Mary Hartung, in manner and form aforesaid, him, the said Emil Hartung, feloniously, willfully, and of her malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said William Reimann, late of the city of Albany and county of Albany aforesaid, before the said felony and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit, on the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, at the city of Albany, in the county of Albany aforesaid, was accessory thereto before the fact, and then and there feloniously and willfully, and of his malice aforethought, did counsel, hire, advise, command and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Mary Hartung, willfully contriving and intending said Emil Hartung with poison, willfully, feloniously, and from a premeditated design to effect the death of said Emil Hartung, to kill and murder, on the said tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, with force and arms, at the city of Albany, in the county of Albany aforesaid, feloniously, willfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did convey and have into the house of said Emil

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Hartung, there situate, a great quantity of the sulphuret of arsenic, to wit, ten drachms of the sulphuret of arsenic, being a deadly poison, and that the said Mary Hartung afterwards, to wit, on the same day and year and place aforesaid, the said sulphuret of arsenic in the said house then and there being, then and there feloniously, willfully, and from a premeditated design to effect the death of him, the said Emil Hartung, and with the intent aforesaid, did put into, mix and mingle with certain water, gruel, beer and soup, and certain other substances to the jurors aforesaid unknown, the said Mary Hartung, then and there well knowing the said sulphuret of arsenic to be a deadly poison, and that the said Mary Hartung, afterwards, to wit, on the same day and year aforesaid, at the city of Albany, in the county of Albany aforesaid, willfully, feloniously, and from a premeditated design to effect the death of him, the said Emil Hartung, did take, give, administer and deliver to the said Emil Hartung, the said sulphuret of arsenic, so put into, mixed and mingled, in manner and form aforesaid, with the intent that he, the said Emil Hartung, should take and swallow down the same into his body; the said Mary Hartung then and there well knowing the said sulphuret of arsenic to be a deadly poison, and the said sulphuret of arsenic so taken, given, administered and delivered to the said Emil Hartung, in manner and form as aforesaid, the said Emil Hartung did take, drink and swallow down into his body, he, the said Emil Hartung, not knowing that there was any sulphuret of arsenic, or other poisonous ingredients, put into, mixed and mingled with the said water, gruel, beer and soup, and substances as aforesaid, by means whereof said Emil Hartung became and was mortally sick and distempered in his body, and the said Emil Hartung, of the poison aforesaid, so by him taken, drank and swallowed down into his body as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the said tenth day of April, in the year aforesaid, until the twenty-first day of April, in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, did languish, and languishing did live, on which said twenty-first day of April, in the year afore-

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said, at the city of Albany, in the county of Albany aforesaid, the said Emil Hartung, of the poison aforesaid, so given, administered and delivered, taken, drank and swallowed down as aforesaid, and of the said mortal sickness and distemper occasioned thereby, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Mary Hartung, in manner and form aforesaid, him, the said Emil Hartung, feloniously, willfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said William Reimann, before the said felony and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit, on the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, at the city of Albany, in the county of Albany aforesaid, was accessory thereto before the fact, and then and there feloniously, willfully, and from a premeditated design to effect the death of him, the said Emil Hartung, did counsel, advise, command and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Mary Hartung, feloniously, willfully, and of her malice aforethought, and from a premeditated design to effect the death of the said Emil Hartung, devising and intending the said Emil Hartung, to poison, kill and murder, on the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, with force and arms, at the city of Albany, in the county of Albany aforesaid, a certain quantity of deadly poison, to wit, ten drachms of deadly poison, a more particular description of which is to the jurors aforesaid unknown, feloniously, willfully, of her malice afore-

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thought, and from a premeditated design to effect the death of the said Emil Hartung, did give and administer unto the said Emil Hartung, with intent that he should take, drink and swallow down the same into his body, the said Mary Hartung then and there well knowing the same to be a deadly poison, and the said deadly poison so given and administered unto the said Emil Hartung as aforesaid, the said Emil Hartung did then and there take and swallow down into his body, by means and by reason of which said taking, drinking and swallowing down the said deadly poison into his body as aforesaid, the said Emil Hartung, became and was mortally sick and distempered in his body, of which said mortal sickness and distemper the said Emil Hartung, from the said tenth day of April, in the year last aforesaid, until the twenty-first day of April of the same month, in the same year, at the city and county of Albany aforesaid, did languish, and languishing did live, on which said twenty-first day of April, in the year aforesaid, at the city of Albany and county of Albany, aforesaid, the said Emil Hartung, of the poison aforesaid, so given, administered, taken and swallowed down as aforesaid, and of the said mortal sickness and distemper occasioned thereby, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Mary Hartung, him, the said Emil Hartung, in manner and form aforesaid, feloniously, willfully, and of her malice aforethought, and from a premeditated design to effect the death of him, the said Emil Hartung, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said William Reimann, before the said felony and murder was committed, in manner and form aforesaid, by the said Mary Hartung, to wit, on the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, at the city of Albany, in the county of Albany aforesaid, was accessory thereto before the fact, and then and there feloniously, willfully, and of his malice aforethought, and

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from a premeditated design to effect the death of the said Emil Hartung, did counsel, advise, command and procure the said Mary Hartung, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

SAMUEL G. COURTNEY, *District Attorney.*

The prisoner pleaded not guilty, and the case was brought on to trial at the Albany Oyer and Terminer, in January, 1859, before Mr. Justice *Harris*, and the Justices of the Sessions.

Samuel G. Courtney (District Attorney), and *Lyman Tremain*, Attorney-General, for the People.

W. J. Hadley and *A. J. Colvin*, for the prisoner.

The following testimony was taken:

Dr. Joseph Levi, sworn as a witness for the prosecution, testified: I am a physician and surgeon, practising in Albany; I know defendant, and have known her for six or seven years; I knew Emil Hartung; I knew him sometime longer; my acquaintance with defendant commenced when she was married to Emil Hartung; I have attended the family sometimes; in April last I was called upon to attend Emil Hartung; first saw him in my office; it was on the 11th of April; he complained of a pain in his throat; he coughed most all the time he was in my office; he looked rather feverish; after a short examination of the pulse and throat, and after giving a description of the whole case, how he felt for the last few weeks, I formed the opinion that he was suffering from acute inflammation of the larynx; he told me that several weeks previous he exposed himself very imprudently in the lager beer cellar of Mr. Schindler; that he had taken off his coat, vest and neckhandkerchief, and exposed himself to a draft; that as soon as he came out he felt that he had taken cold; that he felt himself hoarse, and had slight pain in the throat; this affection, he said,

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troubled him some all the time, but did not prevent him from going about his business; but for the last two days his case had become worse, and that the night before he came, he could not sleep all night; I prescribed for him; I wrote a prescription for him, and told him to go to Saulsters and get it there; the prescription was six grains of tartar emetic, dissolved in six ounces of water, with directions to take a common spoonful every two hours; I directed him to put a mustard plaster on his neck, to drink tea made of marsh mallow root, and to go to bed, and try to get into a perspiration; he then left me; I was called to see him at his house next day; his house was on the south side of Division street, between Green and Union; he kept a lager beer saloon, and found him in the back room of the first story in bed; his breathing was a little easier than the day previous; he told me he had been in a perspiration all night; that he had vomited frequently during the night, and the morning, too; I ordered a blister to be put on his throat; he complained still about the pain in his throat, and about the cough; ordered the rest of the medicine to be continued, in smaller doses, on account of the vomiting; I went again the same evening; that was on the 12th of April; it was between 9 and 10 o'clock; there was little, but there was the inclination to vomit yet; I called again next morning; I generally saw his wife there; his condition was rather worse; there was a great deal of oppression of the chest, difficulty of breathing; I found it advisable to bleed him; I bled him; I discontinued the tartar emetic on account of his inclination to vomit; I prescribed nitrate of potassium, and muriate of ammonia, to be dissolved in a mixture made of a mucilage of gum arabic and sweet almonds; I am not positive that the bleeding took place on the 13th or the 14th; I think it was on the 13th; I called again the same evening; found him a good deal better; I followed the same treatment for the next three or four days; I called on the 14th; he did not complain of the pain, but the hoarseness and cough continued; the fever was less; if I bled him on the 14th, the improvement I have mentioned was on the 15th; from that evening there was a little improvement

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every day; the hoarseness and the cough continued, the cough with less violence; he sometimes expectorated blood; I thought the case was assuming a chronic character; did not change the treatment for the next two days; saw him twice every day; on the 19th and 20th, I made a different prescription, consisting of muriate of ammonia, and a few grains of henbane; during the whole sickness he complained of an aversion to food; his wife complained that he would not take any of the drinks prescribed; he continued to ask for cold water or lager beer; when I told him he must take such nourishment as I prescribed, he said he couldn't—that everything had such a peculiar taste; his wife was present; on the 20th of April I visited him in the morning; found him the same as the day previous; rather better; he said he had no passage for the last 48 hours; I left him two light cathartic pills, with directions to take them; I went again at 10 o'clock that evening; found him so changed that I considered him in a dying condition; his face was hypocratic, showing distress, as if seeking for air; could get no breath; his breathing was very laborious; he was very restless, throwing himself from one side of the bed to the other; the pulse very quick, small, irregular; extremities cold; his skin of a livid color; I was surprised, exclaimed, For God's sake what has taken place, he has changed so quick; his wife said, "Since you gave him the pill this morning he hasn't stopped purging and vomiting;" I said "that is an impossibility, the pill can be borne by a child two years of age;" I asked for some other cause of the symptoms; "what has been done—what did he eat or drink that he has come to such a condition?" she said he had been drinking excessively all day cold water and lager beer; I asked her for the vomit and the stools; she said it had been thrown away; I left him a very little pill, containing about half a grain of opium, considering it a case of cholera morbus, contracted in his debilitated state, by exposure and intemperance, drinking the cold water and beer; his wife told me he went down into the cellar to get water himself; I left him, telling him I would be back again in about an hour; I came back a little before 12 o'clock; found

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him still worse, and rapidly sinking; I gave up all hopes of his recovery, and left the house; when I went out I did not know that his wife was aware of his condition; I found there a man boarding in the house—a man by the name of Reimann; his wife was in the room when I went there; I have some recollection that I saw Mr. Malder there; about 8 o'clock Malder came for me; I declined going; about half an hour after, he came again, and requested me to go once more; I went; staid but a very little while; he was dying; he couldn't speak; I think he had no consciousness; his skin was more livid; I mean the extremities; his feet and hands were of a livid color; he asked permission to drink water most all the time I was there; he asked permission to eat beer soup; he said nothing would taste well but beer soup; I asked defendant, when there, what she had given him; it was in consequence of what I saw in the condition of the patient; it was his aversion to all food; she said everything she offered him was declined after he had tasted it; I asked him why he did not take different food and drinks offered him; he said he would not have anything but what tasted fresh to him, water or lager beer; she said he ate a little of the beer soup; the larger portion he would not take; when I was there the night before he died, he said, "O, what a pain;" I asked him where the pain was; he did not answer, but said, "I would rather be dead than alive;" these were the last words I heard of him; the vomiting for the first two days, and the purging, I considered the effect of the tartar emetic; I considered all the symptoms, during his sickness, natural, except the symptoms of the last evening; I prescribed nothing except what I have stated; the medicine I prescribed would not resemble, in taste or smell, phosphorus; I was careful in investigating the cause of the aversion to food; his wife told me that before he got sick, he didn't eat much, and that he drank a great deal of beer; I considered his intemperance as the cause of the aversion to food; this, and the tartar emetic, and fever, and coughing, would account for the distaste for food; the symptoms of poisoning by arsenic, as laid down by different writers, are purging, vom-

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iting, cutting, perforating pain in the region of the stomach, general distress, burning thirst, appearance of bluish, sometimes dark red, spots on the skin of the body, in some instances falling off of the hair, a very frequent, irregular, intermittent pulse, evacuation of the bowels, and the vomit, intermixed with blood, and sometimes foamy matter; convulsions generally take place; Hartung, I should think, was 80 and some years old; Emil Hartung died on the 21st of April last.

Being *cross-examined*, he testified: I am 88 years old; am a German; have been here ten years last June; have been practising my profession in this city during all that time; was a physician and surgeon before I came here; got my diploma at home; I have prescribed for Hartung before; once for bleeding at the nose; he had the appearance of being a heavy drinker of lager beer; he was a man of a full plethoric habit; a heavy cold would take severe hold of such a man; he was laboring under a severe cold on the 11th of April; his whole system was in a state of fever from the effects of that cold; he coughed severely and almost incessantly; he had been laboring under the effects of the cold about three weeks when he called to see me; complained that he had suffered very much from it for the last two days; before that, he said he was hoarse from coughing; he did not complain of any pain or physical disability before he took the cold; I did not put up any of the medicines I prescribed; the prescriptions were in the Latin language, all of them; I directed him to take them all to Saulter's; the fever would naturally render him adverse to food; a patient suffering from fever has generally no appetite, but a constant desire to drink, especially cold water; the effect of the tartar emetic would be to produce thirst; tartar emetic is a mineral poison; it was after the fever abated, and the case assumed a more chronic character, that he expectorated blood; I did not make the cathartic pills I left him, myself; I got them from a Mr. Griffin: I can't say how long I had had them before I gave them to Hartung; I did not see them prepared, and don't know of my own knowledge what they contained; when I came out of the room the last night I was there, Rei-

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mann was standing behind the door; I asked him whether he knew that Hartung was in a dying condition; he said, "yes, I know;" then I asked him "if Mrs. Hartung is prepared for the event;" and added that it would be advisable to prepare her for the event; he said "she is prepared—he had told her to-day it is no use to harm herself too much, she might get sick herself, and her children would suffer under it;" he said something to the effect that "he had been preparing her for that event;" I think Reimann was not fully dressed at the time; I had before seen Reimann; he was playing at a German theatre.

Theodore Malder, sworn as a witness for the prosecution, testified: I reside in New York; in April and May, 1858, I resided in the house of deceased at 46 Division street; I had resided there previous to their moving into the house; I knew defendant; they came there about February, 1858; they kept a lager beer saloon and boarding-house; I had known deceased before that about a year or two; I recollect about the time he was taken sick; it was in April, about the 10th or 11th; he had been around the house a few days before taking to his bed; he complained of cold; he took to his bed for the first on Saturday night; I saw him frequently while he was confined to his bed; saw defendant in his room; I once heard a quarrel between defendant and deceased; it was before he was taken sick, a week or two; he told her he would not take her to balls any more; he said he wanted to dance with her, and she was engaged, and would not dance with him; she begged him to let her go again; I occupied the front room; there was a folding-door between my room and his; I was in his room on Sunday after he was taken sick; he was alone; he was hoarse; complained about his throat; I visited him often; generally when I came to my meals; I saw him two or three days before he died; I found him one night about one or two o'clock in his room; he was out of bed; was very much excited; he called me in from my room; he knocked on my door; I went in; his wife was there; his children were there; he asked me if I would not get him a drink of water; he did not want his

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wife to bring him the water; he said she didn't care a damn for him; defendant was on another bed in the room; his bed was near the folding-door; her bed on the other side of the room; the first thing he said when I went in, was about getting water; he was out of bed and angry; I got him in bed, and then went for water; this was before defendant said anything; after I brought him the water he drank it; she said to him he did not treat her right; that she would get the water, but he would not let her; I left the room; the day before, she told me she did not sleep there; that day she said her husband was very low; said he didn't do what the doctor ordered him to do; said he went down in the basement and got water for himself; I asked her why she let him go; she said she didn't sleep in his room; I said she ought to sleep there to attend to him nights; she said there was no other bed there; I went into Hartung's room, and told him if he wanted anything nights, if he would knock on the door I would get it for him; that night he called; I saw him again the next day when I went to dinner; he was alone; he was always in a kind of excitement; I saw him again the night he died; he died about half-past seven or eight o'clock in the morning of the 21st of April last; defendant called me in about two o'clock; she was there, and Reimann; deceased was out of bed on the chamber; his wife and Reimann held him; he could hardly breathe; he begged me to run for the doctor, or he would be choked; I run after the doctor; I came back; the doctor didn't come; found deceased in his bed; I left the room and went to bed myself; a short while after defendant called me again; wanted me to go for the doctor again; I went into deceased's room; he begged me to go quick; was afraid he would choke to death; I went after Dr. Levi again; he came; Hartung was then sinking very fast; he begged the doctor to save him, he was so choked; begged the doctor not to leave him; he complained of burning in his chest; said "Oh, cut that open;" wanted to get out of bed; after the doctor left, I remained in the room with Reimann; I heard a conversation between the defendant and Reimann, about seven o'clock; Reimann said to defendant,

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"we should have a post-mortem examination to see what ailed him;" she said, "Oh no, oh no, I won't have him cut open;" I then left; there were other persons there at the time; I said "it wouldn't be necessary, because I thought he died of inflammation of the throat;" he died Wednesday morning; I think he was buried next day; at the funeral the corpse was in the bar-room; there were ladies there; defendant was in my room up stairs; there were other ladies there; before deceased was taken sick, about five weeks before, deceased was drinking coffee; he said, "what is in my coffee, it looks so curious I won't drink it;" defendant got up from the table, and took his cup of coffee and carried it down stairs; she brought up another cup; she said that in the cup she carried down there had been sulphuric acid; that Mr. Wintzen had given it to her to clean tin with; that the coffee might unfortunately have been put in the cup without its being cleaned out; she said it was poisoning; I said to deceased in a joke, "Your wife wants to poison you;" she got mad at me; she did not say anything; a few days after, I told her I did not mean anything; defendant had two children; one about fourteen months old, one other about three years old.

Being *cross-examined*, he testified: I am thirty years of age; am a German; have been in this country about six and a half years; I came from Saxony; I was a copyist there; I have been in Albany about two or three years; I boarded in the house when Decker kept it; myself and Reimann were both boarders when Hartung and his wife came there; I had known Reimann about a year previous; Reimann was a segar maker, and occasionally played in the theatre; I don't know whether Mrs. Hartung was acquainted with Reimann before they moved to Division street; I have stated all the quarrel I ever heard between Hartung and his wife; Hartung had contracted this cold about two weeks before he was confined to bed; Hartung went to work as usual, and took his meals with the boarders, down to the time he was confined to his bed; up to the time Hartung was taken sick, Reimann and myself and Streit, and two other three men boarded there, down to the time he was

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confined to his bed; there was a basement; we took our meals before his sickness, in the bar-room; the hall is on the east side; the cooking was done in the basement; Mary Foell and Mrs. Hartung, I believe, did the cooking before this; I have seen Mrs. Hartung doing the cooking; the circumstance about the coffee cup took place when the family took their meals up stairs, and was about five weeks before he was confined; he was well as usual at that time; he was very hoarse during the two weeks before consulting Dr. Levi; I am not sure whether he took to his bed Saturday or Sunday; I can't remember what day he died, whether it was Wednesday or Thursday or Friday; it was during the week of his death that Hartung called me into his room; there were two beds in room the night Hartung knocked for me; at the time Mrs. Hartung said she would not have her husband cut open, Reimann said, in German, "We must have a post-mortem examination," and she said, "I won't have him cut open."

Re-direct.—I was one of the coroner's jurors; saw the body of deceased about four weeks after his death, at the burial ground; coroner Dean and Dr. Rheinhardt were there; the body was that of deceased.

Henry Schroeder sworn as interpreter.

Mary Foell, sworn as a witness for the prosecution, examined through the interpreter, testified: I resided with defendant in February, March and April, 1858, in Division street; I did not know them before I went there; they kept a lager beer saloon; they kept boarders; I recollect of Hartung becoming sick; before he took to his bed he was a little sick; he had a hoarse throat; it was eight days, a fortnight, or three weeks after he complained of this before he took to his bed; I cannot say; he worked for Mr. Schindler at that time; he went to work every day until he was compelled to lay down; defendant attended him during his sickness; she furnished him with his meals, beer and beer soup during his sickness; she cooked them; they were cooked in the kitchen; it was under the bar-room; previous to his sickness, defendant had a conversation with me about going to a druggist's; this was before

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he had a hoarse throat; he was quite well then; she said I should go to Mr. Saulter's for some blauseure (prussic acid); Saulter is an apothecary, at the corner of Green and Division streets, two or three doors from Hartung's; she said she would clean a copper vessel with it; I went to the druggist's; I asked for some blauseure; Saulter was not in; a young man was there; he said, "What do you want?" I said, "blauseure;" he said, "that stuff we do not have, and if we had it we would not give it, for if you should smell of it it would kill you before you got home, for the smell itself would cause death;" then I was ashamed and went out; I returned to defendant and told her Saulter was not in, and the young man does not give it to me, that he said the smell alone would cause death; then she said "well," and I went off, and placed the bottle on the mantle-piece; she said nothing else; after that I had another conversation with defendant; it was the Sunday before Hartung died; it was in the basement, in the morning; no one present; I was in the kitchen when she came in; she asked me whether I was going out this afternoon; I said yes, if I can I will go out; she said I should bring something home with me for Mr. Streit; the name of it was arsenic; she said I had to be careful that I should not get any of it on my fingers or my dress; further, that the child did not get any of it; I took the child along with me; she said, it is poison; then I was right angry; she told me where to get it; in Pearl street, at Mr. Springhart's; I said, if it is poison, Mr. Springhart will not give it to me; Mr. Saulter neither has given it to me; then she said I should only say it was for Mr. Streit, a boarder; that he intended to stuff birds with it; that then Springhart would give it to me, she said; then in the afternoon, when I went out, I asked defendant whether I should bring it home with me; Reimann was there when I asked this; he was standing behind the bar; defendant then said to me in a low voice, "*I will go after it myself*;" this was all she said then; defendant said she was at Saulter's, and that he did not have that stuff.

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The counsel for the People then proposed to put to the witness this question: Was anything said by Mrs. Hartung on the subject of not getting the arsenic at Mr. Saulter's, and if so, state it? The question was objected to, first, as leading, and second, as improper. The objection was overruled by the court, and the question admitted, and the prisoner, by her counsel, duly excepted. The witness answered as follows: "Yes, she said she was at Mr. Saulter's, and he did not have that stuff."

Defendant waited upon deceased; she cooked his meals; I saw her; she went out every time and had something between her fingers, which she *threw in*; I was in the kitchen at the time; she went into an entry where she got what she put in the food; there were shelves there; she went to a spot where a bottle was standing, and took something from the bottle—rather a jar—with her fingers; I did not notice this jar before the last three days before he died; then I found the jar and smelt of it; it smelt like phosphorus; it was a little yellow pot like that shown me; when she put her fingers in the jar, she went in the kitchen *and put it in everything, in the tea, in the coffee, in the beer soup, and everything which was cooked*; I smelt of a piece of sandwich which he had left untouched, and found the same smell; this was at the same time she was putting it in the meals; this was a fortnight or three weeks before he went to bed; when she came out of the entry, after going to the jar, she would hold her hand partly behind her (witness describes how, with her own hand); I always noticed this smell in the articles of food she cooked; it made me cough (witness describes how); we had towels to wipe the kitchen vessels; after defendant had *thrown it* into the meals, then she washed off her fingers on the towel; I was often going to use the towel after that, but couldn't use it on account of the smell; I threw it among dirty wash; I washed the plates upon which the meals were put, and off which he had eaten; I had to wash them in five or six waters before the smell went off; I have never heard defendant say anything about rats or mice in the house; she said there were no rats in the house; I was

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there at the time of Hartung's death; I think he died on Wednesday; he died about eight o'clock in the morning; after he was dead, I saw defendant in the bar-room on the lounge; a quarter or half an hour after he was dead; Reimann was on the lounge with her; hand to hand and head to head; there was no other person there; she did nothing when I went in; Reimann did nothing; I told defendant I wanted money; then she gave the key to Reimann, the key to the drawer in the counter; Reimann gave me the money, and I went out to a grocery store; I left the two there when I went out; deceased was buried on Thursday afternoon; I saw the corpse carried out at the funeral; after the hearse had started I saw defendant; she came into the bar-room not long after the hearse left; we could still hear the music; it was a military funeral; Reimann was in the bar-room; Mrs. Streit also; she was a boarder; defendant was sitting at the window; Reimann was behind the counter; Mrs. Streit was sitting opposite defendant at a window; Reimann then said, "Do you want a glass of beer, Mrs. Hartung, and you, Mrs. Streit?" then he asked me; I said "yes, I'll take a small glass;" Reimann then said, "Mrs. Hartung, do you want a small glass or a big glass?" she said, "I want a small glass;" she was very merry and laughing; she was laughing *after* she had taken the beer; I can't say whether Reimann laughed; I took my glass, and went out with the child; the first two months I was there, I slept in the kitchen; after that, in the second story in the back room, a small back room; during Hartung's sickness, defendant sometimes slept in the room, sometimes up stairs in a little room, and sometimes in another room; in the beginning of his sickness, and also in the latter days of his sickness, she sometimes slept in his room; Reimann had a small front room up stairs in the third story; I slept up stairs, in a front room, with the children, at the time of his death, in the third story; the first night after his death, defendant slept there with the witness and children; there were four beds in the room; the night after the funeral I slept again in the small room in the second story; defendant said she could not sleep well in the other bed; she would sleep in

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the bed where I had been sleeping in; in the evening at ten o'clock she made up my bed in the little room; the bedstead was too large—would not go in; defendant herself sawed off so much that it would go in; then I slept in the little room; there were still four beds in the upper room; two bedsteads without bedding, or three; Reimann's room was a little front room on the same floor; I went to defendant's room next morning after breakfast; defendant had left the room; she was down stairs; in front of the bedstead I found half a segar on the floor; the bed she had been occupying; the bed was very much tumbled; the little child had slept with her, and was very wild; the oldest child had been sleeping in the other bed; I had seen no segar there the night before; after the death of Hartung, Reimann would take his place behind the counter when he came home from his work.

Being *cross-examined*, she testified: I have been in this country one year and seven months, and have lived all the time in Albany; I have not seen Mrs. Hartung since she was in jail; I have been to the jail since Mrs Hartung was confined there; I went there to take Reimann his meals, for the people I was living with; have seen Reimann three or four times since he was in jail, and have had conversations with him; the woman I was sewing for, did washing for him; Reimann came into the kitchen to take his meals; I shall be 29 years of age next summer; I did not know Hartung, or Mrs. Hartung, or Reimann, before I went to live with them; I never heard Hartung complain of being unwell before he took his cold at Schindler's; Hartung was laid up abed when I noticed the smell in the sandwich; I noticed that smell on everything he ate, two or three weeks before he was taken sick; I mean before he was taken sick abed; I noticed all these smells before he was laid up; Hartung was still at work when I noticed Mrs. Hartung throw this stuff into his food; it was two or three days before his death that I found the jar; I had not seen the jar before then, but I often saw her before that throw it into his food; Hartung ate with the family until he was taken sick to his bed; before he was taken to his bed, he generally took his

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meals with the family when he was home at the regular time; at supper he was generally home, and then partook with the family; mostly he was at work for Schindler, and then he did not come home to dinner; if Hartung was at home he partook of breakfast with family; when he worked at Schindler's he sometimes came home at one hour, and sometimes at another; sometimes Hartung came home at one hour, and sometimes at another, when at work for Schindler; I don't know whether he then got his dinner; I don't know when he did his eating; because I paid no attention to it; I don't know of his having dinner at home at any time when he didn't dine with the family; if he didn't come at the regular meal times, Mrs. Hartung cooked for him; I never cooked for him; he took his dinner, and then went off again; I never heard him make any complaint about his meals before he took to his bed; the same smell was in the kitchen before he was taken sick, when he took his meals at home; I coughed when he was eating alone; Mrs. Hartung was there then, and I was there, and it was then the smell was so bad; it was only one single time that Hartung was eating in kitchen, and I ate of the same soup; I paid no attention whether Hartung coughed when I coughed; it was a fortnight or three weeks before Hartung was taken sick to his bed, that the towels smelled so bad; I picked up the little pot after Hartung's death; I picked up the pot after I had seen Reimann and Mrs. Hartung setting hand to hand, and head to head; I went up to bed-room to find the child; I didn't say this morning, I didn't know whether I went after the child or not; on Sunday previous to Hartung's death, Mrs. Hartung called the substance she wanted me to get, arsenic; she did not tell me how much to get; this was said in the basement; nobody was present; it was in the forenoon, after breakfast.

State all the conversation that took place on Sunday.

Mrs. Hartung asked me "whether I was going out in the afternoon;" I said "yes, if I can I will go out;" Mrs. Hartung said "yes, if you take the child you may go;" nothing else was said in the morning; in the afternoon, about three

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o'clock, I asked her "whether I should bring that stuff home with me;" oh, I have forgotten a great deal; if I am not asked for it, I forget it; only wait a little, and let me think it over; Mrs. Hartung said, "you must bring something along for Mr. Streit; the name of it is arsenic, and he is to stuff one bird, and you must be careful not to get it on your fingers, or dress, as it is poison;" then I said, if it is poison, Springhart will not give it to me; Mrs. Hartung said, "Oh yes, only say it is for Mr. Streit, and he will give it to you; I have been to Mr. Saulter's, and he did not have it;" in the afternoon, about 3, I asked Mrs. Hartung "if I should bring it," and she said "no, I will go after it myself;" I then went out, and got home before 6 o'clock; I don't know, whether I believe that Reimann and Mrs. Hartung occupied the same bed; I had no opinion whether the segar was left there by Reimann or not; Reimann was never in my room.

Re-examined, she testified: I tasted of the soup Hartung ate, and had to vomit terribly; I took two spoonfuls; it tasted not good; this was a fortnight or three weeks before he was taken down and while still at work for Schindler; I showed that soup to Mrs. Streit; Hartung had eaten of that soup in the kitchen, and that was the only time I saw him eating in kitchen; I cooked for the boarders; I first saw the little pot three days before Hartung's death; I took it in my hand and smelt it; after his death, I found the pot on the floor behind a box in the hall; I saw Mrs. Hartung fetch this stuff always for eight days or two weeks before he was taken sick to his bed, and always afterwards whenever she could; I followed her the day when I found the jar; I saw where she took it from; I stood behind the door and saw her take it; Mrs. Hartung did not know I was watching her; the jar was then little less than half full; when I picked it up after his death, there was but little in it.

Re-cross-examined, the witness testified: I said this morning the same smell and taste was used in my country to poison rats; I recognized that smell from the first; I knew then, that for two or three weeks Mrs. Hartung was putting in her hus-

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band's food stuff that smelt the same as we used to poison rats, but supposed it to be medicine, until I saw where she took it from; but then I thought it was not right, but didn't know what it was; Mrs. Hartung kept her eyes on me; and one time asked if there was any water in the tube; I was looking at her, and she at me; after I found the jar, I did not speak to Mrs. Hartung; I gave the jar to Mr. Streit; when I found the jar and smelled it, I replaced it in same place; I found the jar first on a shelf, and after Hartung's death on the floor; there were two jars, both smelling like this, and the same stuff in it; one day I saw one jar lying in the privy like this; I only found one jar with this stuff in; I did not notice Mrs. Hartung cough when she cooked the victuals; I gave the jar to Mr. Streit when Mrs. Hartung had gone out, and Reimann was at work; I gave it to Streit the same day I found it, and about a week or a fortnight after Hartung's death; I never told Hartung of her putting this stuff into his food; I spoke to Mrs. Streit about it the last week before Hartung's death, and then requested Mrs. Streit to smell the tea and coffee, &c.; this, I think, was the week before Hartung's death; I have heard Hartung and his wife quarrel; I don't know when it was; I was just going into the room; I heard Hartung say, "You manage me to get me sick, or make me clear out;" she said, "You may say whatever you like; I will do what I have a mind to; you may go where you came from; go to the devil;" then I went up and didn't hear any more; they often had a few words together; and Mrs. Hartung generally went off, and locked herself in another room; after Hartung's death, I saw all the bottles, and a little jar, like the one here, in the privy; Mrs. Hartung said the bottles were useless, and she would throw them in the privy; she said this two or three days before Hartung's death.

Re-cross-examined: The bottles were medicine vials that had accumulated during Hartung's sickness.

Louis Saulter, sworn as a witness for the prosecution, testified: I am an apothecary; my shop is at the corner of Green and Division streets; I know defendant; I had been acquainted

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with her as long as she lived in Division street; I had seen her at my place several times before the death of her husband, before and during his sickness; the first time I saw her she came with Mr. Hartung; he told me she was unwell; complained of having pains in the stomach; he told me I should put up a little medicine for her; I prescribed for her; it was the first few days after they came to Division street; I saw her on several occasions after that, when she got small articles; some six weeks before his death, she procured a small jar of phosphorous paste; she complained of there being so many rats about the premises in consequence of the stable being near by; I told her to spread the paste on bread; I labeled it poison, and she went away; I recollect of seeing her again during his sickness; she brought some prescriptions, which I put up for Mr. Hartung; the prescriptions were from Dr. Levi; I saw her twice on the Sunday before her husband's death; first between nine and eleven in the forenoon; she was alone; she had some medicine prepared for her husband; she said that "one of her boarders desired her to bring along the same article that Mr. Heeshon uses for preparing bird skins to stuff;" I asked her "whether she knew the name of the article she wanted;" she said "no, she was not sure of it;" I asked her "if it was alum;" she said "no, it is not alum;" I told her, "as there were various drugs used for this purpose, she would do better by asking again what it was;" she said "she thought it would be best, that she should go home again and ask him, else he may come himself and get it;" then she left; I saw her again in the evening of the same day; it was just at dark; I lighted the store while she was there; she bought some marsh mallow and liquorice roots; she asked for this when she came in; I put these up for her, and delivered them to her; then she said: "It is arsenic I ought to have brought along this morning; give me six cents' worth of it;" then she told me "one of her boarders had brought home a couple of birds, and that he wanted to stuff them;" I put up some arsenic for her, three-fourths of an ounce of white arsenic; when I had it weighed, it was too dark to label it; so I lighted the gas, and

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went to my desk to label it; then she said, "You need not take so much trouble about it;" I told her I was obliged to do that by law; that she must tell her boarder to take good care of it, for it is a very strong poison; then she said, "I did not know that, it is for Mr. Streit; I think he knows it;" then she left the store, taking the arsenic with her; I kept prussic acid in February, March and April; it is a poison; it is never used for cleaning kettles; phosphorous paste is a poison in large doses; it is used for killing rats; I sell it under the name of rat-poison.

Cross-examined, he testified: I swore before the coroner's jury that I was not sure that I had sold defendant rat-poison; I only remember it now because I see her face in court

Charles W. Schindler, sworn as a witness for the prosecution, testified: I live on the Bethlehem road; I know Hartung and defendant; have known them five or six years; I knew Emil before he was married; I was a brewer in March and April, 1858; Hartung worked for me then; he was peddling beer, and besides had a saloon in Division street; I put him up in Division street; so far as I know, he had nothing except what he had accumulated out of his wages; I gave him 2s. for every barrel he carried out; he had been at work for me two years; he was quite a healthy man; he had a conversation with me six or eight weeks before his death, about himself; I saw defendant on the day on which she left the city; I think it was three or four weeks after the death of Hartung; it was at her bar-room; I told her I had something important to inform her of; she went up stairs with me; I told her, there is a rumor in the city that you have poisoned your husband; she began to cry and gesticulate, and asked me whether I also believed what people were saying; I answered her, I would believe it too, if she was not willing to go with me right off to the District Attorney, or the police office; that she was owing it to herself and her children to have her husband disinterred at the expense of the State, and then it would become evident whether he had been poisoned or not, and whether she was guilty or not guilty; she began to cry very much, and requested me to

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wait until to-morrow morning at nine o'clock, on account of her being unwell, and then she would go along with me to the police or the District Attorney; I then left her house; next morning Mr. Hardus came and woke me up; I was at the place frequently between the death of Hartung and the time defendant left; I saw Reimann acting as bar-keeper, selling beer and waiting upon the guests; nothing more; Hartung had been sick the last four weeks before he took to his bed; I told him to go to bed; he was about thirty years old; I cannot say that he was living intemperate; never have seen him drunk.

Thomas McBride, sworn as a witness for the prosecution, testified: I was a police officer in April, 1858; I was in the house of defendant after the death of her husband; before I went in on the morning of the 17th of May, I was on my beat, and passing through that street, I saw a light in the house; it was three o'clock in the morning; the light was in the bar-room; I went to the window; saw a gas-light burning; at first thought it was fire; saw a candle lit on the counter; there was a looking-glass in the rear of the saloon, and in that looking glass I saw the shadow or reflection of two persons; I watched there some fifteen or twenty minutes; I saw one person get up off the lounge there, and came towards the window where I stood; that person I thought was defendant; she turned down the gas and went to the drawer, and I could hear money rattle; she closed the draw, took the candle in her hand, and walked back towards the centre of the room, and set the candle down on the table; immediately afterwards, I saw two persons on the lounge again; they were lying down side by side; I watched them sometime, probably ten minutes; it had then got to be about half-past three; it began to look dark inside on account of the day-light, and then I left; defendant was one of the persons on the lounge, and Reimann the other; the same morning I went in there; it was on Monday; I saw defendant; it was between six and seven o'clock; I did not have a conversation with her; I went in again on Wednesday following; saw her; she was alone; I asked her how she got along since her husband died; she said not very well; I asked her

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how long he had been dead; she told me three or four weeks; I asked her how many children she had; she told me two; then I told her I thought she was doing pretty well, because she sat up late at nights; she told me she did not; I told her I knew better; she asked me how I knew it; I told her I had seen it; she asked me how; I told her through the window; she asked me what I had seen; I told her I had seen her and Reimann on the lounge; she said they were not doing anything there; I told her yes they were; she asked me what I had seen them doing; I told her I had seen Reimann have his hands around her neck on the lounge, and kissing each other; I told her then that I thought they were doing something worse than all that; she denied doing anything more than kissing; then I told her she ought to be ashamed of herself to carry on in that way, and her husband dead only three or four weeks; I said, why don't you marry him if you like him; she said she intended to do so; that she did like him; then a German came in by the name of Miller; I asked him to take a glass of lager beer; Miller went out soon and I followed him; in the conversation she told me not to tell of what I had seen; I had another conversation with her after that; I afterwards went to New York to search for her; other officers were with me.

Frederick Wirtz, sworn as a witness for the prosecution, testified: I live in Jersey City; keep a tavern; I saw defendant on the 21st and 22d of May, at my house in Jersey City; Reimann was with her; this is the man; a little girl was with them; they got there about four o'clock; Reimann came first, and asked if he could stay over night with his wife; I told him yes; he said he would fetch his wife from the depot; he came back with defendant and the child; he asked for a room; I shewed them a room; at six o'clock I called them to supper; they all came down; they took supper; after that they went right away up stairs again; in the morning when I came from the market, about half-past seven, they were taking their breakfast; Reimann afterwards came to the bar and paid my bill; he asked me if his wife could stay there until 12 o'clock;

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I said yes; he said he had some business in New York, and to take his wife and child with him was too much trouble; he went away with a carpet bag about 10 o'clock; at 12 o'clock I went up to her room, and asked defendant if she would take dinner; she said no, and asked me if it was 12 o'clock; I said yes; then she said, I must go, my husband is waiting for me; I went down, and she came right away after me, and went away; that was the last I saw of her until I saw her here; Reimann told me he came from Troy.

Michael Ahearn, sworn as a witness for the prosecution, testified: I live in Troy; I keep a small hotel; on or about the 21st of May I saw Reimann at my house; a woman was with him; I cannot recognize the defendant; they came at a late hour; there was something said when the woman was present.

William P. Brayton, sworn as a witness for the prosecution, testified: I was sheriff of this county in 1858; I know defendant; first saw her at Mr. Wetterbee's, in New Jersey; it was in July last; in consequence of information I received from Mr. James B. Sanders, and two Germans, I went to New Jersey; they had a letter when they came; this is the letter; it was put in my possession; I took it with me; after I came back I delivered it to the District Attorney; when I went to New York, I went to 1099 Broadway; I there found that Wetterbee lived six or seven miles from New York, at a place called Guttenburgh; went to the house of Dr. Wetterbee; I inquired for the doctor; he was not at home; I saw Mrs. Wetterbee and Thomas Matchen; I was asked into the sitting-room; defendant was called in; she was called Elizabeth when she came in; I recognized her by means of a daguerreotype which I had, and which I got of one of the policemen of this city; I called her "Mary;" Mrs. Wetterbee said her name was "Elizabeth;" I then asked her if her name was not "Mary Hartung;" she made no answer; I asked her again "if her name was not Mary Hartung;" she said it was; I asked Mrs. Wetterbee what name she went by; I understood her to say "Elizabeth Shultes;" I asked defendant to turn her collar back to see if she had a spot on her neck; she did so, and I

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saw the spot; I then told her I had a warrant from the county of Albany; she said she would go with me; I told her if it was executed there, she would have to go to jail in New Jersey; she consented to go with me; there was not much said about a requisition; she went and prepared herself, and she came to the boat with me; I brought her to Albany; next morning I put her in jail; after that I had a conversation with her in regard to the letter; it was sometime afterwards, perhaps a month afterwards; there was something said on our way up about a letter; I think she asked me if I had got a letter; I don't recollect her exact words; I had not told I had the letter; I afterwards had a conversation with the prisoner at the jail upon the subject of the letter.

The counsel for the People then proposed to prove what was said by the prisoner in that conversation.

The counsel for the prisoner duly objected to any statement made by the prisoner at that time being given in evidence, on the ground that the same was not a voluntary statement. The court overruled the objection, and decided to receive the evidence; to which ruling and decision the counsel for the defendant duly excepted.

The counsel for the prisoner, by permission of the court, then proceeded to cross-examine the witness, preliminarily to such evidence being received, and he testified as follows:

I cannot state the time of this conversation, but it was within two or three months after the prisoner was committed to the jail; I think likely some other persons were with me; but I don't remember whether there was or not; I don't remember what I went up to her cell for; I don't remember who introduced the conversation; I do not distinctly remember the first thing that was said; there was some conversation between me and her, previous to the subject of the letter being mentioned; I recollect a part of it, not all of it; I may have said to her that this is a very serious matter, but I don't think I did; I will not swear that I did not say to her, "Mary, if you had known that this letter would have led to your detection, you would not have written it;" I don't recollect that I

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did; I will not swear that I did not invite her attention to this letter by some question.

The counsel for the prisoner again objected to the evidence of what was said at that conversation, on the ground that the statements then made by her were not voluntary.

The court overruled the objection, and decided to receive the evidence; to which ruling and decision the counsel for the prisoner again excepted.

Witness being then examined in chief, testified as follows: The first that I recollect that was said, was, she asked "what I thought they would do with her;" I told her "I didn't know; it may be it wouldn't be very hard with her yet, I didn't know what the evidence was;" I think she then said, "if she had not written a letter, she would not have been there;" I asked her "how she came to direct a (or the) letter (I am not certain which expression I used), to Ferdinand Shultes;" she said "Reimann told her to direct it so;" I don't remember anything else that was said.

The counsel for the prisoner then moved to strike out the statements made by her, upon the ground that the same were not voluntary. The court refused to grant the motion, and the prisoner, by her counsel, excepted.

Being *cross-examined*, he testified: I did not think there was any harm in this conversation; I expected I should be a witness; if convicted, I don't know whether I shall claim a part of the reward; I should like to get half of it; I was in prisoner's cell one day previous to this with Mr. Courtney; I don't recollect whether it was Sunday afternoon or not; I think Mr. Courtney was in hearing of that conversation; I talked with her about the letter then.

Louisa Streit, sworn as a witness for the prosecution, testified: I live in Troy; in March, April and May, 1858, I lived at defendant's; was a boarder there; my husband boarded there; we occupied the third story, a back room; we went there about the middle of March; we left about five weeks after Hartung's death; defendant was not there; she had been gone about a week and a half; Reimann had gone, too; I don't know when

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he left; I recollect Hartung's sickness; saw him two or three times during his sickness; first saw him about a week before his death, in his room; nobody there; next saw him about a couple of days afterwards; defendant came in while I was there; defendant told me that Mr. Hartung wanted some apples; she jawed about it; said he troubled her to death; wanted so much from her; I got up and went up stairs, and peeled some apples, and brought them down stairs, and gave them to him; defendant was not there; he ate three apples; defendant came in while I stood at his bedside; she also had brought some apples; I then left; I next saw him the morning when he was dying; I believe it was six o'clock; defendant was present; Reimann also; Malder came after me; Hartung did not know anything when I went in; I heard Reimann say, "if it was anybody that belonged to him, he wanted to have a post-mortem examination;" I told him "I would, too;" defendant then said, "Oh no, we all know of what he died, and I don't think it is necessary;" this is all I recollect; I was in the bar-room the same morning about two hours after; Mr. Streit said he would have a post-mortem examination; defendant got up and said "no;" then I went up stairs; I saw Reimann and defendant together after Hartung's death, about an hour after; I found them in the bar-room sitting on a sofa; they were alone; they were setting near together, hand and hand, and head to head; I also saw them the day he was buried; saw them a couple of times; they sat in the bar-room again in the same way; it was about two minutes after the corpse had been removed; the second time they were talking together; it was about a couple of hours after the funeral was gone; defendant slept the night after the funeral in the room next to me; it was a large square room; three or four beds in it; next morning I heard Reimann; I sat in my room about two o'clock; we had been out; came home about two o'clock; Reimann came about fifteen minutes after; I heard him coming up stairs and going into his room; after a little while I heard his door open; heard him lock the door, and it seems to me as if he went into the next door, defendant's room; I then went to

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bed; about six o'clock next morning I went down into the kitchen; in consequence of something that Mary said to me, I went back to my room; after a little while I heard her baby cry; I went to her room; rapped at the door, and called her; rapped twice; she said "yes, I am in;" she did not open the door; after a little while she came out with the baby on her arm, and went down stairs; I then went down in Malder's room; I went up stairs again; when I came on the middle of the stairs, I don't know what made me, but I turned round and looked at her door, and found I could see under the bottom of her door into her room; I saw two feet moving from her bed across the room, and going back again, dragging something along on the floor; then I stepped back, waiting to see who would come out; I saw Reimann coming out, and going in his room; during the time Hartung was sick, I was in the kitchen; Mary Foell handed me a bowl of soup; I did not taste of it; I smelt of it; it smelt like phosphorus; the effect was like that of inhaling gas; I had smelt the same in the kitchen; I can't say whether before or after; I saw a jar on a shelf, among bottles, in the hall; there was white stuff in it, like lard; it smelt like phosphorus; I left it there; it was not quite half full; Hartung was sick abed when I saw it; I have seen defendant taking coffee and tea to Hartung from the kitchen; I can't say what it was; have seen this once or twice; I have seen her stirring it with a teaspoon when she went up stairs; I went up stairs right after her; once I saw her in the hall where the stuff was, before she went up stairs; my husband is a bookbinder; sometime after the death of Hartung, there was a conversation in the dining room; defendant was there; it was at dinner; I asked Mr. Streit if he knew how to stuff birds; he said no; I asked him if he wanted Mrs. Hartung to get some arsenic for him; he said no; he asked Mrs. Hartung if he had asked her for arsenic; she said that Mary must have made a mistake; that she did not want arsenic, she wanted something to clean Mr. Hartung's mouth with; that she didn't say anything about arsenic; then we all got up from the table; when I spoke about stuffing birds, defendant

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blushed; she was red like fire; we couldn't finish our meal at the table; nobody did; I went up into my room; remained about an hour; then I went down stairs; when I went down, defendant opened the back bar-room door, and called me in; she asked me what I thought about her; I told her, nothing; then she said, "For God's sake, don't say anything about it, folks might think something wrong about it;" then I left the room; I saw Schindler there the afternoon before defendant left; he was there about 2 or 3 o'clock; she went up stairs with him; they were gone a good while; I saw her after she came down; she seemed to me as if broken-hearted; she said nothing; she seemed as if she couldn't speak; Mrs. Harters was there, and asked her what the matter was; she said, nothing; she whispered with Mrs. Harters for most an hour and a half; they stood at the back window in the bar-room; I left them talking there; that is the last I saw of her; a few days before Hartung died, I had a conversation with defendant about Dr. Levi; about a week before; it was in the bar-room; I don't know; I believe it was in my room; I was sick, and was going to take a doctor; she advised me to take Dr. Levi, for he was a very good doctor; that she always had had him; that he always made Hartung well again; she said that this time he was so low that he couldn't make him well any more; I have seen defendant write; I *think* I would know her handwriting; I *think* the letter shown me is her handwriting, but I don't be sure.

Being *cross-examined*, she testified (being shown six papers in writing, she says): I do not know in whose handwriting these papers are; I cannot say whether they are in Mrs. Hartung's handwriting or not; I have been in this country eleven years; I lived only three or four months in Albany; I came from Troy here; I was examined as a witness before coroner Dean, and then testified to all I knew; I intended to state before the coroner all I knew then; I cannot fix the day of the conversation with Mrs. Hartung about Dr. Levi's attending me; I cannot swear it was more than a day or two before Hartung's death; whether longer or shorter I cannot say; I think

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the conversation at the dinner table was five or six or seven days after Hartung's death; Mrs. Hartung sat there at the head of the table; Reimann sat on her left hand; my husband sat at her right hand; my baby sat next to him, and I sat next; Reimann sat near enough to Mrs. Hartung to put his foot on Mrs. Hartung's, if he chose; Reimann had red spots on his face, and looked scared, too; he looked at Mrs. Hartung; Reimann said he didn't know anything about it; I told him no one had accused him; I told Reimann I didn't ask him anything about it; he said he didn't know my husband could stuff birds; and I told him I didn't ask him; Reimann was the first person who suggested a post-mortem examination; Mary Foell handed me the bowl of soup about five or six days before Hartung died; my best recollection is, it was two or three days before his death; I know Hartung was confined to his bed at the time; Hartung very seldom ate with the boarders, except at night; he sometimes took his dinner with the boarders, but very seldom; Hartung was complaining when we went there; I don't know how many days before Hartung's death it was that I saw the little jar on the shelves; it might be three, or four, or five, or six days before Hartung's death; I did not see Mrs. Hartung when she passed the shelves; I went into the kitchen as Mrs. Hartung was coming out, and cut a piece of bread for my child, and spread it, and went right up stairs, and when I left the kitchen Mrs. Hartung was half way up stairs; I smelt the phosphorus as I passed the shelf; I had never discovered that smell before; my husband is in New York; I don't know where he is; I and my husband separated about four months ago; I don't want to tell the cause of our separation; I once saw Mrs. Hartung writing a letter, and at another time writing two receipts; these are the only times I ever saw her handwriting; while she was writing I sat at the other side of the table; I never read anything that Mrs. Hartung wrote; I did not read the letter I saw she was writing, nor did I examine the writing at all; I saw her write a receipt a couple of times; never examined either of them; I think the letter that was shown me is Mrs. Hartung's

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handwriting, because I think it is the same writing as the letter I saw her write, and that is the only reason why I think the letter shown me is her handwriting; I have known Reimann 17 years; I knew him in the old country; I knew all three of his brothers; one of them is now dead; I have been to the jail to see Reimann three times; on the night Reimann left, he came up stairs into my room about 7 o'clock, and put his arms around my neck, and kissed me good-bye; it was not until after Mrs. Hartung was arrested that I went to see Reimann in the jail; I knew Reimann and his parents in the old country intimately.

Ferdinand Shultz, sworn as a witness for the prosecution, testified: I reside in South Pearl street of this city; (looks at the letter before referred to) I saw this letter in July last; received it from the letter carrier; I gave it to the sheriff.

Being *cross-examined*, he testified: I don't know the handwriting of the letter; I read the letter twice, at home, and then before the sheriff; I went to New Jersey at the time the arrest was made.

The counsel for the People here offered the letter shown to the witness, Mrs. Streit, in evidence. The prisoner, by her counsel, duly objected to such letter being received in evidence, on the ground that the same was not sufficiently proven. The court overruled the objection, and decided to receive the letter in evidence; to which ruling and decision the prisoner, by her counsel, duly excepted.

The letter so received in evidence was written in the German language.

Three different translations of the letter were put in evidence—one made by Mr. *Schroeder*, in behalf of the prosecution, one by Mr. *Werner*, in behalf of the prisoner, and a third by the prisoner herself.

The following is the letter as translated by Mr. Werner:

"July 5th, 1858.

"MY DEAR GOOD WILLIAM.

"With grief I take the pen to write to you; I must know how it goes with you; I have no rest any more; I believe I

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shall go crazy; I grieve myself half to death; dear, good William, now I will write you how it went with me, that Monday I left you; I went to Union Hill, from there to Guttenburgh; I asked a woman if she did not know where I could get work as a seamstress; she sent me to Dr. Wetterbee, and there I am now; I have got a very good place, very nice folks; they have no children; they always call me their own daughter, and I earn a good sum of money, and it is a very happy place; every day music—a piano and flute; but all that does not give me any pleasure; when I think of you, my dear, true William, my parents and my children, then my heart bleeds; I set alone many hours, and weep the bitterest tears; but all that does not help me; I see neither you nor my family; but I often think you are with me; I dream of you every night; dear William, I do not know whether you love me still, or whether you have forgotten me; my heart clings to yours; you don't know how I love you, or else I should not have committed this misfortune; dear, true William, do not feel bad; this unhappy misfortune which has occurred between me and you, I have only to attribute to you; your true love was the cause of it; you know dearly we loved one another. Oh, William, how terrible it is for me! no soul to whom I can open my heart; no person I know; what shall I do? if I could only know how you are, whether you are in prison or not, then I should feel content.

“On Sunday, the 4th of July, I prepared myself and went to Fort Lee; I thought to see your brother, and perhaps he could tell me something about you; but I did not see or hear anything of him. I went sorrowful to my home; dear William, I believe if your brother had seen me he would not have recognized me; I wear a nice, big flat, curl my hair, and low-neck dresses, and a small velvet ribbon round my neck, so that the mole on my neck is not seen. Dear, true William, from my heart I beg you to write as soon as possible; and as soon as you get my letter, go to my parents, and let them read the letter, but be careful that you are not seen; don't leave the letter behind you, and be careful, dear William; but write me,

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too, if you paid Nic. Engle that \$9.00; if not, let me know, and I will send you that amount of money, that you can pay him; but write to me who has got my things, and who has got the house; the \$10.25 that you gave me, dear William, I have still, and have so much more as makes up \$20, and I think that in a few months I shall have a nice sum of money; but, William, I wish you could come to New York, that I could tell you my feelings; you can come several times in the week, with the seven and a half o'clock boat; you can be careful so that nobody sees you; but before this, write me first how it goes with you, and then I will write you more how you have to act.

"Dear William, write me how the celebration of the new flag went off, whether you was happy or not; with all my heart I should be very glad if you had much pleasure.

"They undoubtedly make great ado about me in Albany; one thing more. I dreamed last week that my little Emma had died, for which I should feel greatly grieved; how often Rosy must be asking for her mother; how awful when I think about it; also write me how you arrived in Albany, and whether you had trouble with the child.

"Dear William, go to my parents if you want to write, so that nobody sees you; William, I tell you do not neglect it, but write as soon as you get my letter; I swear to you, and I will remain true to you to my end. I share my life with you; my respects and kisses to you many thousand times.

"Your much beloved,

"MARY THERESA KOEHLER"

"DEAR PARENTS:

"You will grieve yourself terribly on my account, on account of the occurrence of the terrible misfortune; you know well what was the cause—love. William loved me, and I loved him; I have never in my life loved a man as much as I loved William; I did not show him my love; I kept it still by me. Dear mother, you know how unhappily I lived with Emil; how many bitter tears I shed, and complained to you

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of my distress ; you know I did not love Emil ; but I tried to make myself love him ; I cannot write any more.

"I will write you a letter under your name, Louisa Leopold ; but you must look in the Dutch paper every Saturday, and tell your number and name at the post-office, or else you cannot get the letter.

"Address Elizabeth Schuldze, 1099 Broadway, New York."

Noah S. Dean, sworn as a witness on the part of the prosecution, testified as follows : I am a coroner ; on the 21st of May, my attention was called to the case of Hartung ; I summoned a jury ; took them to the Universalist burying ground ; we disinterred the body ; Dr. Reinhart was there ; found the body in a remarkably good state of preservation ; the feet and hands looked like those of a person who had not been dead more than two or three days ; a post-mortem examination was made by Dr. Reinhart ; I assisted him ; the trachea, stomach, liver, lungs and intestines were taken from the body ; they were put into a pail, and delivered at the Medical College, to Murray, the janitor.

Being *cross-examined*, the witness testified : I am a practising physician and surgeon ; I saw Reinhart take out the contents of the body ; the grave-digger supplied the pail, into which these portions of the body were put.

George Murray, a witness sworn on the part of the prosecution, testified as follows : I was janitor of the Medical College in May last ; I received a pail from Dr. Dean in May last ; the 21st of May, the latter part of the afternoon ; I put it into the laboratory ; it was covered with a paper ; I could not find Professor Porter ; I delivered the pail to Professor Porter the next day, about one o'clock.

Jacob Reinhart, sworn as a witness for the prosecution, testified : I am a practising physician and surgeon ; I knew Hartung ; saw his body at the Universalist burying ground on the 21st of May ; I made a post-mortem examination.

Being *cross-examined*, he testified : I stated before the coroner's jury, that the irritating matter, of which the deceased

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died, must have been taken into the stomach two months before death; that is my opinion now.

Being *re-examined*, on the part of the prosecution, he testified: I am familiar with the appearances produced by arsenic: after death there will be a corrosion of the mucus membrane of the stomach, from the pylorus to the œsophagus; sometimes pure arsenic will be found in the stomach; the white powder; the cause of Hartung's death was inflammation of the œsophagus and stomach.

By the court. I stated before the coroner's jury that the irritating matter must have been administered a long while, I suppose two months, to have produced the chronic inflammation of the throat; it might be that the death was accelerated by something else; the appearances which I observed could not be produced by arsenic administered within three days of the time of the death; the appearances were sufficient of themselves to produce death.

Being *re-cross-examined*, he further testified: A severe cold and drinking would be likely to produce such inflammation.

Charles H. Porter, a witness sworn on the part of the prosecution, testified: I am professor of chemistry in the Albany Medical College; I have had experience in post-mortem examinations, with a view to the detection of poison; I received from Murray a pail containing the contents of a body; it was on Saturday afternoon, the 20th or 21st of May; there was a paper over the contents of the pail; I think I can determine in many cases, where arsenic is discovered, whether it was placed there before or after death; in some cases from the appearance of the stomach or other organ examined; if, for example, on examining the stomach or the liver, I were to find it whole, and were to remove the exterior portions and find in the interior mass evidences of poison, I should believe that it was placed there, or came there during life; again, if on examining the stomach, I should find the interior surface, in and beneath the mucous membrane, with yellow patches, and should ascertain that they were composed of sulphuret of arsenic, I should believe that arsenic was administered while the person

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was living; in this case I examined the remains, with a view to ascertain whether there was arsenic, and whether it was deposited there, before or after death; I discovered arsenic, and believe it came within those organs before death; I had no difficulty of satisfying my mind, that the arsenic I found was taken into the stomach before death; I detected arsenic in the stomach, and in the liver; the greater portion in the stomach; I found in two-thirds of the stomach, six grains of arsenic; the other third was reserved to be examined, in case the two-thirds should be destroyed; I have examined a part of the other third; found arsenic in that; from the discovery of the arsenic found, I should infer that most probably a large quantity had been taken; I should think the remaining portion was removed by purging and vomiting, and absorption into other organs; from finding a considerable quantity of arsenic present, I assumed that the person died from the effects of the arsenic taken; that is my present opinion; I could form an opinion as to the length of time that elapsed between the administration of the arsenic and the death; I did form such an opinion; I now have it; from finding a considerable quantity of arsenic, I formed the opinion that the person could not have lived long; it might have been one day or several days; I could not state, with any degree of certainty, to the presence of arsenic in the liver; I should suppose, that soon after the administration of any soluble poison, it might be detected or found in the different organs; arsenic is soluble; my profession leads me to become acquainted with the symptoms of poisoning by arsenic; first, faintness, nausea and vomiting, great thirst; this is nearly universal; one of the most characteristic symptoms; constriction of the throat; pain in the stomach, increased by pressure, generally a small pulse; irregular; rather frequent; sometimes twitching or convulsions of the limbs; diarrhoea and vomiting; I have seen hoarseness noticed; arsenic is considered by many to have a remarkable preservative action, preventing decay; that is the reason why it is used in preserving animals, skins, &c.; Taylor on Poisons, and Christison on Poisons; Otto is also a late and standard work;

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3 or 4 grains of arsenic have been known to produce death ; the quantity varies with the age, constitution and peculiar circumstances ; my profession also leads me to a knowledge of the post-mortem appearances of death by poison ; I should think it not unlikely that I would find more or less inflammation of the stomach ; the mucous membrane would be more or less changed ; there might be an appearance of blood being present ; blackness arising from an engorgement of the vessels ; these appearances I have myself seen in cases of arsenical poison ; I should think it not unlikely that I should find inflammation in the smaller intestines ; I should presume, though I could not speak with certainty, that the cesophagus would be inflamed.

The counsel for the People then proposed to the witness the following question : " In your opinion, *can a physician*, from a mere post-mortem examination of the exterior surface, and the indications of inflammation which he discovers, determine with any degree of certainty, the precise period of time when such inflammation was caused ? " The prisoner, by her counsel, duly objected to such question, first, as immaterial and improper, second, as incompetent. The objections were overruled, and the prisoner, by her counsel, excepted.

The witness answered as follows : I think not ; for this reason, that different substances might be used, which would produce more or less quickly, and to a greater or less extent, the inflammation. I discovered certain unnatural appearances which might have been caused by arsenic ; in the stomach, I discovered appearances of inflammation ; I speak of the interior surface ; especially was this so near the lower orifice ; I also noticed blackness in parts, beneath the mucous membrane, owing to the blood vessels being filled with changed blood ; also that the mucous membrane was easily detached by pressure with the finger ; I noticed the appearance of ulceration, or corrosion, in the upper part of the intestines ; these are all the abnormal appearances that I observed, except patches of a gamboge yellow, upon the interior surface of the stomach ; this same appearance was also noted upon the exterior surface of

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the liver; these are the unusual appearances which arsenic might produce; all these are laid down as post-mortem appearances of death by poison; I regard the yellow spots as the most marked and striking indication; nothing but arsenical compounds will produce those spots. I found the sulphuret of arsenic; if a person had taken white arsenic while living, after death, as decomposition proceeded, the white arsenic might be converted into the yellow sulphuret of arsenic; sulphuretted hydrogen is evolved in the process of decomposition, and that unites with the arsenic; this combination produces sulphuret of arsenic. Witness presents a portion of the stomach, over which are spots of sulphuret of arsenic; witness also presents specimens of arsenic, and compounds of arsenic, which were produced by the examination. The card marked A, contains the results of the examination of two-thirds of the stomach; tube No. 1 contains sulphuret of arsenic; No. 2, metallic arsenic, black; No. 3, sulphuret of arsenic; No. 4, white crystalline arsenious acid, the common white arsenic of the shops; No. 5, black metallic arsenic; No. 6, porcelain, with metallic spots of arsenic; No. 7, the same. The card B contains the arsenic and compounds derived from the examination of the interior portions of the liver; No. 8, metallic arsenic, black; No. 9, porcelain, containing spots of metallic arsenic; No. 10, tube, containing metallic arsenic; No. 11, containing crystallized arsenious acid; it is not unusual to find arsenic in the liver in cases of arsenical poisoning; I employed a number of different processes—one, Marsh's method, another Reinsh's method, Fresenius and Ballo's method; besides these, and the verification of the results obtained, other chemical tests were employed; each of these methods is distinct and independent of the other; I regard Fresenius and Ballo's method as the best; it is absolutely impossible, in using these methods, to mistake another substance for arsenic. I have employed all these methods in this case.

Being *cross-examined*, he testified as follows: I am twenty-four years of age; I have been a professor of chemistry for about four years; two years of the time in the Vermont Medi-

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cal College, and two years in the Albany Medical College; I was an assistant to Professor Silliman in Yale College, for about three years, before I took the professorship in the Medical College in Vermont; while in Vermont, I made tests for arsenic in the human stomach; I had but one case in Vermont; it was not a case of poisoning by arsenic; I examined three or four cases elsewhere, and in two of them found arsenic; I did not conduct the examination alone; since I have been in the Albany Medical College, I have examined about a dozen cases, and found arsenic in five of them; I conducted those examinations alone; the gastric juice may produce some effect on the stomach after death; the gastric juice might produce erosion of the stomach; gastric juice will not produce blackness of the stomach, to my knowledge; blackness might be produced by any powerful solvent; I decline answering, without I am compelled to, whether I swore that I examined to ascertain whether the arsenic was placed in the body before or after death; I did make such examination; I changed the method of examination to discover whether the arsenic was placed there before or after death; I did not suspect that arsenic had been placed in the stomach after death; I made the examination for the reason that I might take all the possible precaution; I did not make independent investigation to ascertain whether arsenic had been placed in the stomach before or after death; I made an extension of the same investigation; the extension applied to the determination of the quantity of arsenic present; the first part of the examination was devoted to an inspection of the stomach, to determine whether I thought the arsenic had been placed there before or after death; the latter part to ascertain the quantity; the other case was an extension of the first; the process of my examination was, first, a physical examination of the interior of the stomach; having satisfied myself of this, I continued the examination; it was from the physical examination of the stomach that I determined that the poison had been in the stomach before death; I made no chemical tests to determine that question; I

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pretend to be able to judge from my own knowledge of the effects of arsenic on the stomach ; I have never introduced arsenic into the stomach after death ; beside myself, the janitor and a student have access to my laboratory ; I have no idea where this student is ; he is twenty-two or twenty-three years old ; he had a key to my laboratory, and had the privilege of going in there when he pleased ; I presume he might have been in the laboratory when I was making my investigations ; I have some little reasonable doubt whether or not he was present ; I don't remember whether he was present or not ; I formed my opinion at time of examination as to the time which had elapsed between administering the poison, and time of death ; I formed a definite opinion, which is not changed ; that opinion is, it might have been one or several days ; I produced six grains of arsenic from the stomach ; I may have some little doubt whether that arsenic was administered within two or three days before death ; I thought it might have been administered within a day ; because, according to authors of repute, the administration of considerable quantities of arsenic might produce death within a day, or after the lapse of several days ; one dose, in considerable quantity, might produce death as well as several doses ; and one large dose, the day before death, might have caused death ; I will not swear that this man did not die of disease of the brain.

It was then admitted by the counsel for the prisoner, that the name of the defendant's mother, before marriage, was Louisa Leopold.

The evidence on the part of the prosecution here rested.

It was then admitted that the defendant's maiden name was Maria Theresa Koehler ; it was also admitted by the prosecution, that according to the general opinion and judgment of those who have known the defendant well for years, that her general character was good ; it was also admitted by the prosecution that the six papers in writing, which were shown to the witness, Mrs. Streit, were in the handwriting of defendant.

Leo. Altmayer, sworn as interpreter.

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Mary Foell, recalled, testified: Defendant did not tell me at any time before the death of Hartung, that "if she found me again with Reimann she would discharge me."

Abraham Saulter, sworn as a witness on the part of defendant, testified: I reside in Lydius street; I have seen defendant three times previous to this trial; I was at her place twice before her husband's death; I was there once when defendant was scolding Mary Foell; it was about two weeks before his death; I heard defendant speak to the girl; she told Mary "if she caught her and Reimann together again she would discharge her;" Mary said "it was Reimann's fault, not hers."

Being *cross-examined*, he testified: first told this at Mr. Colvin's office this morning; went there of my own accord.

The evidence here closed.

After argument by counsel for the defendant, and by the Attorney-General on the part of the People, Mr. Justice *Harris* charged the jury as follows:

Gentlemen: Emil Hartung died on the 21st day of April last, of a violent illness; for several weeks he had complained of hoarseness and soreness of the throat; on the 11th, which was Sunday, he consulted Dr. Levi, and received from him a prescription for his complaint; the next day Dr. Levi was called to again visit him; after being twice solicited he did so, and he found him laboring under a serious illness. He again prescribed for him; Hartung continued to complain of hoarseness and sore throat, and was afflicted with coughing. He continued to visit him once or twice a day, and prescribed for him various medicines, under the operation of which he thought he was improving, until the Tuesday, the second week of his illness; he saw him on Tuesday morning, and still deemed his symptoms favorable; he left him that morning, and until then had discovered no unusual symptoms in his case. But when he visited him on Tuesday evening, about ten o'clock, when he again saw him, he discovered an alarming change in his appearance. When he looked at him, he discovered in his countenance indications of the appearance of death. He at once exclaimed, "What has been done?" "What has he taken?"

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and turning to his wife, said, "What have you given him?" He lingered on through the night in excruciating pain, burning thirst, quick, irritated pulse, throwing himself from side to side, complaining of an intense pain in the chest, and begging of those around him to cut it open, that he might be relieved. He lingered through the night, and died next morning between seven and eight o'clock. It is alleged, on the part of the prosecution, that this was not a natural death; that it was a death caused by felony; that he came to his death by poison, and that poison was administered by other hands than his own.

Now, gentlemen, the first question you are to consider, is, whether the allegation is sustained. Your inquiry will naturally be first directed to this question: Did Emil Hartung die by poison?—was that the occasion of his death? In addition to the symptoms described by Dr. Levi before the death, we have the fact, that after the body of the deceased had been in the grave four weeks, it was disinterred; and an examination had of it. You have had described by Dr. Reinhart the appearance and contents of the stomach. But the most important, and perhaps the only competent testimony presented to you on this point, was the testimony of Professor Porter. He instituted a most careful scientific investigation of the contents of the stomach and liver; an examination which the counsel, as well for the defence as for the prosecution, admit to have been of a very able, thorough and scientific character, as it undoubtedly was; and the result of that investigation of two-thirds of the entire stomach, was the discovery of six grains of arsenic. If we admit, as we must, that the other third of the stomach contained the same proportion, equally diffused, we have the fact before us that the entire stomach contained nine grains of arsenic. If to this is added the quantity found in the liver, and the quantity which was diffused through other parts of the system, there was poison enough *present* to have killed three or four persons; for it is said that three or four grains of arsenic is sufficient to cause death. At any rate, gentlemen, this you will have no difficulty in saying, that there was poison

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enough found diffused through the stomach and system of the deceased to render it impossible that he should live; the fact is established, that by some means a sufficient quantity of poison had found its way into the system to produce death. It has been argued by the counsel for the defence, that it is still possible that some other disease might have produced these causes. It is for you, gentlemen, to say whether that is your opinion; whether the cause of his death was or was not poison, and whether it is your duty to speculate as to the cause of his death, when it is in conclusive evidence that there was found in his stomach a poison sufficient to cause inevitable death. Now, gentlemen, if you are satisfied on this point that Emil Hartung came to his death by poison, the next most serious and painful inquiry is, who, if any, was the guilty agent? by whose hand was this poison administered? who was guilty? how came this arsenic in the system? how did it get there? who gave it? how came it there? and you, as the final arbiters of the fate of this unhappy woman, it becomes you to give to the consideration of the evidence your best thought, your most careful reflection and attention, that your powers will enable you to do. It is an awful position for any man to occupy, to sit upon the life of a human being; but it is well the duty thrown upon you has fallen into such hands. During the progress of this trial, I have, again and again, reflected upon the wisdom of the founders of our government, who placed cases like this in the hands of men like you, men selected from the body of the people. You have seen how carefully you have been examined to see that you stand indifferent; what careful regard was paid to the rights of the prisoner, and how scrutinizingly you were selected from among others, that you, and not they, should sit in judgment. It is a wise and merciful provision; none could devise a wiser or better mode of administering criminal justice. It becomes you to address yourselves to the duty before you with your best faculties; God give you strength and wisdom to do so. Some evidence has been given, gentlemen, and it was competent to show a motive for the administration of poison, to prove that the

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accused had been guilty of improper conduct during the lifetime of her husband. The first thing bearing upon the case related to some inquiry about prussic acid. It appeared that some time before the illness of Hartung, some six weeks before, the servant of Mrs. Hartung was sent, for what she calls "blauseure," and that Mrs. H. told her that she wanted it to clean some copper vessels. On inquiring for it at the druggist's, the young man of whom she inquired for it, told her that he hadn't it, but if he had it he wouldn't give it to her, it was so violent a poison, that if she even smelt it, it would kill her before she reached home. On returning home, and in relating the result of her visit, she said to Mrs. H. that she was ashamed when the young man said this to her. The only reply was, "well," and the girl went and put her vial on the mantel. This is the story. I may as well say here as elsewhere, gentlemen, in regard to the testimony of this girl, which was deemed important, you saw her on the stand, where she exhibited a good degree of intelligence and candor. She occupies a humble condition in life; she is a German girl; and you were obliged to receive her testimony through an interpreter. Considerable scrutiny should be exercised in giving full credence to the testimony of a girl in her condition, so received. It is not too much to say that, in a case of life and death, a jury, acting upon such testimony, should require that it be supported by corroborating evidence, before founding a verdict upon it. I saw no inclination on the part of this girl to pervert the truth; yet she is not very intelligent, and her sympathies are not entirely in harmony with the defendant. It is quite possible, also, bear this in mind, that when sent on this errand, nothing had occurred to excite her suspicion; it is quite possible that she may have mistaken the name of the article she was sent for. Perhaps the strongest evidence that this was not so, is the fact that when she related the conversation to her mistress, she did not try to correct her. But too much importance should not be given to this testimony. It was an afterthought. It had occurred before Hartung had been taken sick, and her recollection may have been impaired. The next fact adduced,

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is in relation to the article called phosphorus paste. In relation to that, the witness, Saulter, testifies. There is something singular about it; what the article is, we do not know; what it consists of, we are not confident; all we know about it is, that one of its ingredients is phosphorus. To what extent that enters into it we do not know, or whether it is poisonous; we only know that Saulter swears that if administered in large doses it would produce death; but what have we in relation to the use of this article? The amount of testimony is about this: Mary Foell and Mrs. Streit had their suspicions aroused about some improper use of this article; whether it was administered to the deceased; whether any considerable quantity of it had been placed in the food, is not established; the testimony in regard to it amounts to about this. There was ground for suspecting that in reference to the use of this article there was something improper; whether it is in evidence that there was an improper use of this article, it is for you to decide. These are the only two points where guilty practices are attempted to be proved, until we come to the purchase of the article supposed to have produced death. This part of the testimony demands your most careful consideration. You are aware that the indications of approaching death were discovered for the first time on Tuesday evening; on the Sunday before, a little more than two days before the death, we learn from the apothecary that the accused was at his shop; she came there to have some medicine, prescribed by Dr. Levi, put up for her husband; when it had been put up, she said she wanted also some of that article which Mr. Streit used for stuffing birds; he said several articles were used for that purpose; she replied that she did not know the name of it; was it alum? she replied no; when he told her she had better inquire and call again, she yielded to that suggestion, or said Mr. S. would call himself; that same morning, before dinner sometime, she was in the kitchen, and inquired of the servant girl if she was going out that afternoon; the girl said she would like to; Mrs. H. replied that she might, and that she wished her, when she came home, to bring something from the druggist's shop in South

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Pearl street; she went on to say that it would be very necessary for her to be very careful with it; that it was strong poison; that she must take care and not get it on her fingers or dress; and very careful that the child she was to take with her should get none on it. The girl says she replied to this request by referring to the fact (and you will regard this as significant), that on a former occasion she had been refused an article of poison when she called at Saulter's; she replied, tell the druggist that one of the boarders wants it to stuff birds with, and he will give it to you. This is about the substance of that interview. The next and fourth step is, that we find the accused, just at the twilight on that Sunday, at the druggist's, where she buys some liquorice and another inoffensive article, and then adds: "The article I should have bought this morning is arsenic," and she asked for sixpence worth. The druggist put up three-fourths of an ounce; he lit his gas at the same time, to see to label it, as the law requires, "poison." He went to his desk to do so. She said it was unnecessary; the man who wanted it knew what it was, and it was not necessary to go to the trouble he proposed. He said it was a strong poison. She replied that she did not know that it was; but that Mr. Streit wanted it to stuff birds with. This is the substance of this interview and we have thus far these four facts proven: first, her application, on Sunday morning, for arsenic at the druggist's; second, her return home without it; third, her application to the girl to procure it for her, and her excuse; and fourth, her procurement of it just at dark.

Now, gentlemen, this article was thus procured; we find the accused in possession of three-fourths of an ounce of arsenic, and we find her husband dead from poison within 56 hours afterwards, and the question here arises, and it is the great point in the case, whether, in view of all these facts, your minds turn unhesitatingly to the accused as the person who procured and administered arsenic to produce the death of her husband? The defence has presented a theory, which is of sufficient importance to receive from you a careful inquiry, to see whether or not some other may not have procured and

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administered this poison. The theory of the defence is, that this woman had surrendered herself to the man whose name has been so often mentioned, William Reimann, a boarder in the house, and that she was but an instrument in his hand, in removing the husband of the woman he had seduced. It is for you to say how far the testimony sustains this theory. The defence allege that he induced the accused to procure this poison; that she procured it without knowing the object for which he intended to use it, but that he intended to use it to accomplish what he effected. If this is so, if you can satisfy yourselves that it is so, that she was the mere tool of this man, then I say you will be justified in saying that this woman is not guilty of this murder. It is for you to say how far this theory is sustained by the testimony.

Now, so far as I have observed, the only testimony connecting Reimann with this transaction, in any way, is the following: You will remember, gentlemen, that during the night, or early in the morning, when Hartung died, Dr. Levi was sent for. At first he declined to go, but went the second time he was called for. The doctor found him insensible and dying. As he, the doctor, left the room, he discovered Reimann standing behind the door, where he could observe what was passing in the room. The doctor asked Reimann if he was aware of the condition of Hartung. He said he was. He then said it would be proper that Mrs. H. should be prepared for her husband's approaching death. Reimann's answer was, that she was prepared; that he had told her not to harm or grieve herself too much; not to make herself sick; that if she did, the children would suffer. This interview showed that Reimann was quite aware of Hartung's condition, and that he had informed Mrs. H. of it. This may be regarded as a piece of evidence to show that Reimann had a guilty knowledge of what was going on. So far as I recollect, there is no other fact going to show that he had any knowledge of the procurement or administration of the poison. The next fact of importance was elicited from the witness, Malder. He says, that at about 7 that morning, whether before or after the death does not ap-

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pear, he had a conversation with Reimann and accused, during which R. remarked, that if a relative of his should die under such circumstances, he would have a post-mortem examination, but that Mrs. Hartung said she would not have it. It is for you to say what weight should be given to this. There is a natural aversion in many minds to such examinations, and it is for you to say whether his remark in any way points to her guilt. In regard to Reimann's remark, it was argued that it was an exhibition of craft and guilt, rather than of innocence, to avert attention from himself, and to fasten suspicion upon the accused. You must weigh this evidence.

The judge then proceeded to allude to the evidence, showing a guilty connection between the accused and Reimann. This does not materially bear upon the case. There was, it is clear, a warm and strong attachment existing between them. She was in his possession, under his control, infatuated. No other being had so much control over her. An incident occurred at the dinner table, five or six days after the funeral, which cannot have been forgotten by you. Mrs. Streit, whose suspicions were excited even before the death, by some means or other, had become possessed of the history of the accused's procurement of the arsenic, and, with a boldness somewhat remarkable, while all were sitting at dinner, asked her husband if he knew how to stuff birds. This must have fallen with crushing weight upon the accused. No, he said. Then she continued, did you send for arsenic to stuff birds with? No, was his reply. The accused, at these questions, evinced great embarrassment, and all left the table. The theory of the defence, in regard to this incident, is, that then, for the first time, the truth flashed upon the mind of the accused, that she had been made the instrument of Reimann to produce the death of her husband. If this be so, it may account for her subsequent conduct. An hour or two after, Mrs. H. called Mrs. S. into her room, and requested her to say nothing more on the subject. The judge then referred to her husband's employer's interview with her, two or three days after this. He told her of the suspicions excited, and begged her to clear herself of

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those suspicions. She asked him if he suspected her. He said if he did not he would, unless she went before the authorities and demanded an investigation.

She said she was unwilling to go with him then, but if he would call next morning, she would do so. But instead of doing so, that night herself and Reimann left the city, lodged together at Troy, then proceeded to New Jersey, where she found a retreat in a small town in that State.

It is always a ground of suspicion against a person, that he tries to escape. It is deemed evidence of guilt, but is not always conclusive. In this case, she was with her lover, and the man she loved. He did go with her, and she was absent from the city nearly two months. The next piece of evidence is the letter she wrote to Reimann under the assumed name he gave her. This letter is deemed evidence of her guilt, but it is not conclusive. That letter falls, providentially, into the hands of a man bearing a name similar to that it had superscribed upon it. He opens it, and, knowing some of the facts in the case, handed it over to the sheriff. The judge reviewed the language of the letter at some length, and cautioned the jury against receiving it as conclusive of guilt, particularly as they had to rely upon a translation, which might not give fully the meaning of the writer. He alluded also to the remark which the accused made to sheriff Brayton, that, but for the letter, she might have escaped. The only importance to be attached to that evidence, was, that it proved that she wrote the letter, not that its language was proof of her guilt.

Gentlemen, in conclusion let me say, however guilty the accused may have been in other respects, however censurable, however unfaithful to her husband, however she may have followed her paramour, these facts should not weigh in the slightest degree on your minds, as to her guilt of this charge of murder. They are only admissible to show the motive which might have existed for the commission of the deed. The theory of the prosecution is, that the accused was induced to this act by her love for Reimann, that she might possess and enjoy him, and ultimately make him her husband. So far as

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it bears on this point, this testimony is competent, but no further.

And now, gentlemen, you see that the important points involved in this case are embraced in a brief period of time, from the 18th to the 21st of April. You will inquire, when you retire, is the testimony adduced conclusive, that the accused procured the arsenic that caused the death of Emil Hartung, and was that arsenic administered to him by her hand? The law gives to the accused the benefit of every reasonable, rational, well grounded doubt. It is an admirable feature of our law, that maxim, that an individual is always to be presumed innocent until guilt is established. Every jury is allowed to act upon this presumption; and if the guilt of the accused, in this case, is not established to your entire satisfaction, this presumption comes in, and allows you to say that she is not guilty. It is the right of the accused, that she shall have the benefit of every reasonable doubt. But if, after considering the whole case; if, after a deliberate review of the testimony; if, after considering the testimony in all its bearings; if, then, your minds are led irresistibly to the conviction that the poison which produced his death was administered by the hand of the prisoner, that she is guilty of her husband's death, then, however fearful, however dreadful the consequences may be, however painful to her, you have no alternative. The oath which you have taken, that a true verdict you will render, requires that you should pronounce her guilty. Gentlemen, I submit the case of this unhappy woman to your hands. Be merciful, but just. Let your verdict be such that, in after life, when you reflect upon this awful moment, your consciences will be at rest. Hold the balance of justice with an even hand.

Give the accused the benefit of every reasonable doubt; but if you can find no such doubt on which your merciful wish can hang, then you must render a verdict of guilty.

Gentlemen, the destiny of the accused is in your hands.

The jury retired to consider their verdict on Saturday, the 5th day of February, and on Monday, the 7th day of Febru-

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ary, came into court and submitted the following communication:

"The jury are willing and ready to admit that the prisoner is not innocent, but is guilty to a certain extent, *but not as principal*. We are *divided* on this question. Now, sir, they wish to know, if they can render any other verdict than 'guilty' or 'not guilty' of the crime of which she stands charged?"

Judge Harris: I see, gentlemen, the point on which your minds are laboring, and I feel bound to say this to you, that I can conceive of no aspect of the testimony in this case, which would warrant you in finding any other verdict than "guilty" or "not guilty" of the crime with which the accused is charged. There are cases where the testimony may warrant a conviction for a crime of an inferior grade; but in a case of this character, a case of poison, the accused is guilty or not guilty of the crime. While I am pained to say so, I am constrained to say that, in this case, a verdict of manslaughter would not be sustained by the evidence.

Foreman: Some of the jury wish to know if the counsel for the prosecution and the prisoner would agree on a different verdict than guilty, whether it could be done.

Judge Harris: I suppose not; counsel cannot agree upon a verdict. The jury have the physical power to render a verdict of manslaughter, as was done in a recent case; but I feel constrained to say it would not be warranted by the evidence.

Foreman: We wish further to state to your honor, *that it is utterly impossible for us to agree upon a verdict, either of "guilty" or "not guilty," we have tried and failed.*

Judge Harris: I would suggest, under the circumstances, the jury having had their minds engaged with this last proposition, whether it would not be advisable to retire for a few minutes, and look over the ground once more, after what has occurred in court.

The jury then again retired, and after an absence of fifteen minutes, returned into court again, with a verdict of "guilty,"

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and the prisoner was sentenced to be executed on Wednesday, the 27th day of April, 1859.

A motion for a new trial was subsequently made and argued before the Court of Oyer and Terminer, on the ground of various irregularities alleged to have been committed. On denying the motion, the following opinion was delivered by

HARRIS, J. This application is founded upon irregularities which are alleged to have occurred in the jury room while the jurors were engaged in their deliberations. But *one* of these irregularities is established by proof. It *does* appear that one of the jurors inquired of a constable who was in attendance, whether the jury could not bring in a verdict of manslaughter, stating, at the same time, that if they could do so, the whole jury would agree on such a verdict. The constable, in violation of his duty as well as his oath, undertook to give his opinion. He said he thought they could, but added, that they had better consult their foreman, who, *being a justice of the peace*, would probably know. The Revised Statutes were subsequently sent for by the jury, and their provisions in relation to the crimes of murder and manslaughter examined.

This proceeding on the part of the jury was a reprehensible irregularity, and is sufficient to vitiate the verdict, unless it appears, beyond all reasonable doubt, that no injury has resulted from it to the defendant. It is necessary, therefore, to consider this question.

After the jury had thus endeavored to ascertain for themselves whether they could find the defendant guilty of manslaughter, they came into court and stated that they all agreed that the defendant was guilty to *some extent*, but were divided in opinion as to *the degree* of her guilt. They then inquired of the court whether they could render any other verdict than that of guilty or not guilty of the crime charged. They were instructed that a verdict of manslaughter would not be sustained by the evidence, and that guilty or not guilty of the crime charged was the only verdict which they could appropriately render. Under these circumstances, it cannot be possible that the defendant was in any way prejudiced by the

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attempt of the jury to ascertain, by consulting the Revised Statutes, whether they could not convict her of a minor offence. It is very certain, I think, that the verdict has not been affected in the least degree by the impropriety of the jury in seeking to inform themselves as to the law.

The other charges of misconduct, some of which, if established, would be quite sufficient to avoid the verdict, are entirely unproved. These charges rest upon the affidavit of the defendant's counsel who do not profess to have any knowledge on the subject themselves, but make their statements upon their information and belief. Nor do they give the sources of such information. From the character of the charges, however, it may be inferred that it was derived from some one or more of the jurors themselves. The constables who were in attendance upon the jury, have each, so far as they could, denied the truth of these charges.

No rule of law is better settled than that the evidence of jurors is not to be allowed for the purpose of impeaching, or in any way impairing the effect of their verdict. The doctrine has long been established in England. It has been maintained with singular steadiness and unanimity in the United States. With the exception of Tennessee, where, following an early precedent, its courts have somewhat modified the rule, there is not, I think, another State in which the rule has not been asserted and enforced. Even in Tennessee, where the affidavits of jurors have sometimes been received to prove facts which tended to vitiate their verdict, the courts have repeatedly declared that the practice was dangerous, and ought not to be extended a single step beyond what it had already attained.

But aside from all adjudications, the doctrine rests upon the clearest principles of public policy. It is infinitely better that the irregularities which, undoubtedly, sometimes occur in the jury room, should be tolerated, rather than to throw open the doors and allow every disappointed party to penetrate into its secrets. The most enlightened jurists have united in deprecating the mischiefs which would flow from such a license. Nothing would be more sure to detract from the confidence, or

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weaken the security which the community now feel in this justly cherished mode of trial. If this sanctuary were to be thrown wide open and an inquisition held upon the conduct of jurors, and the reasons upon which, individually, their verdict was founded, the trial by jury, now held in such sacred regard, could not long survive the dishonor to which it would inevitably be exposed.

But if jurors should not be allowed to give evidence to destroy their own verdict, how much more objectionable it would be to allow them to expose the occurrences of the jury room, and to allow their unsworn and irresponsible statements to be brought second-hand before the court in support of an application to set aside their verdict. It is impossible to give the least effect to such statements without a fearful departure from the very first principles of evidence.

A point was made by the defendant's counsel, though it was not much pressed upon the argument, that the constables sworn to attend the jury were one or more of them constantly present in the jury room. The practice is not, in my judgment, to be commended, and yet it is almost, if not quite, universal, and I know of no rule which prohibits it. Few verdicts could stand if this were a ground of impeachment.

The only other ground urged by the defendant's counsel in support of their application, is, that the verdict is not, and could not have been, the result of that calm deliberation and concurring judgment which alone could fitly characterize so momentous an act. I have not thus regarded the action of the jury. From the commencement of the trial until their verdict was pronounced, I believe the jury were fully impressed with the solemnity of their duty. Certainly I have seen no evidence to the contrary.

It is true that after they had been engaged in their deliberations *forty-eight* hours, they declared themselves unable to agree upon a verdict, and yet, in a very few minutes after, they rendered their verdict of guilty. To me, however, in view of all the circumstances, this fact does not seem surprising. The defence was presented with a degree of zeal and professional

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skill unsurpassed, if not unequalled, in my experience of criminal trials. To all who witnessed the trial, its effect was manifest. It was felt by all. It awakened not only in the jury, but in all who took part in the trial, an active sympathy for the defendant. The press of the city and the community generally, manifested a kindred feeling. It was under these circumstances and such influences, that the jury retired to deliberate upon their verdict.

The theory of the defence had been that but one person was guilty of the crime as principal, and that the defendant was not that person. It is evident, from the communications received from the jury during the progress of their deliberations, that much of their time was occupied with the consideration of the question whether the defendant or the other person, whose name was associated with that of the defendant in the testimony, was most guilty. No juror seems at any time to have thought the defendant innocent. The question upon which they were divided in opinion, was, which of the two persons implicated in the transaction was *most guilty*. Thus, in the communication made to the judge by one of the jurors on Sunday evening, it is asked whether, "if the jury, after the most careful and laborious investigation, are absolutely unable to find which of the inculpated parties is *most guilty*, a verdict of *not guilty* could be rendered." The communication made to the court on Monday morning, indicates a similar division of opinion among the jury. When, in consequence of the instructions they then received, the jury found themselves restricted to the single question whether the defendant was guilty or innocent of the crime charged, without reference to the guilt or innocence of any other person, their previous deliberations had prepared them to answer the question. Their work was done, and they at once and unanimously said, she is not innocent—she is guilty. The verdict was clearly warranted by the testimony. The defendant had herself procured the poison. She procured it, too, in a manner and under circumstances tending strongly to prove a guilty purpose. It was in her hands on Sunday evening. On Tuesday it was hastening

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to perform its deadly work. It is *possible* that the poison passed from the hand of the defendant to *another hand*, by which it was administered to the deceased. But the testimony reveals no such hand. And even if it were conceded that another participated in the crime, the circumstances are such as scarcely to warrant the jury in exonerating the defendant from guilt.

Having thus considered all the grounds presented by the defendant's counsel, in support of their application, and, as I trust, with an anxious desire that no injustice should be done to the defendant, the conclusion to which I have been led is, that the court is not at liberty to interfere with the verdict. The motion for a new trial must therefore be denied.

New trial denied.

SUPREME COURT. Albany General Term, December, 1859. *Wright, Gould and Hogeboom, Justices.*

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Evidence of a confession made by a party should not be excluded in a criminal case, on the sole ground that it was made while under arrest. Such confession should be received, if it was voluntary, not made under the influence of fear or hope, or under an excitement or agitation of mind, which would probably affect its verity, nor drawn out by the act or conduct of the person to whom it was made.

There is no precise standard fixing the degree of knowledge which a witness must possess of a person's handwriting, to be allowed to express an opinion as to the authenticity of a particular paper. If the witness has seen the party write, and acquired a knowledge, more or less perfect, of the character of the hand, he is allowed to express an opinion.

On the trial of an indictment for murder by poisoning, after an opinion, adverse to the theory of the prosecution, had been testified to by a physician, with reference to the appearances on a *post-mortem* examination, and the time indicated by them when the poison was introduced into the stomach, an experienced chemist, who had made the *post-mortem* examination, was asked by the prosecution the following question: "In your opinion can a physician, from a mere *post-mortem* examination of the exterior surface, and the indications of inflammation which he discovers, determine with any degree of certainty the precise period of time when such inflammation was caused?" and the question was objected to on the part of the prisoner, as being "immaterial, improper and incompetent;"

It was *held*,

That the question was competent;

That the objection raised no question as to the *form* of the interrogatory, but merely as to the substance;

And that the ground of the objection, as stated, presented no question whether an *opinion* was competent on the subject, nor whether the witness was one of the class of persons who were qualified to express an opinion, because such grounds of objection were not specifically stated:

Also *held*, that the subject matter of the question was one upon which a professional man or an expert might rightfully be called upon to express an opinion; And that a chemist would be quite as competent to answer the question as a physician. (Justice Wright dissenting.)

The taking of exceptions is restricted to decisions made by the court below during the progress of the trial. The decision of the Court of Oyer and Terminer, in refusing to grant a new trial, cannot be reviewed on exceptions.

A bill of exceptions should contain no more of the case than is necessary to present the questions of law raised on the trial, and which are the legitimate subjects of review on exception; and where other matters are inserted, they should be stricken out on motion.

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MARY HARTUNG was convicted of the murder of her husband, Emil Hartung, at a Court of Oyer and Terminer, held before Mr. Justice Harris and his associates, in the city of Albany, in the month of February, 1859. William Reimann, her alleged paramour, was indicted with her as an accessory before the fact. The husband died on the 21st day of April, 1858, and, as claimed by the prosecution, from the effects of arsenical poison administered to him by his wife within two or three days previous to that event. On a post-mortem examination, arsenic was found in the stomach of the deceased. A few days subsequently, some suspicion having arisen against the prisoner, she left the city of Albany, where the parties had resided and the death occurred, and went with Reimann to New Jersey, and ultimately found employment at Guttenburg, in that State, in the family of Dr. Wetterbee, where she passed under the assumed name of Elizabeth Shultes. According to a statement by her to the sheriff, after her arrest, and while confined in the jail at Albany, she was instructed by Reimann to write to him under the address of Ferdinand Shultes. She did write a letter thus directed. It fell into the hands of a man in Albany of that name, and its contents led him to suspect that it had reference to the death of Hartung. It alluded to an *unfortunate disaster*, or calamity; was signed with the maiden name of the prisoner, Mary Theresa Koehler; contained a reference to the name of her mother, Louisa Leopold, and requested letters to be addressed to her under the name of Elizabeth Shultes. Shultes placed this letter in the hands of the sheriff, and it led to the arrest of the prisoner. She was found at the house of Dr. Wetterbee, in New Jersey. The letter was offered and received in evidence at the trial, some evidence having been given tending to show that it was in her handwriting. Exceptions were taken to the sufficiency of this proof, as also to the evidence of her statement or confession made to the sheriff, upon the ground that it was not voluntary. Dr. Rheinhart was called as a witness by the prosecution, to prove that he handed the stomach of the deceased, and its contents, to an analytical chemist, Charles H. Porter,

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who made the post-mortem examination. On his cross-examination, Rheinart gave evidence tending to show that the symptoms of inflammation observed about the stomach and intestines of the deceased, led to the conclusion that the irritating matter or poison was introduced into the system a month or two before death. This was adverse to the theory of the prosecution. Professor Porter was then called as a witness on the part of the prosecution. He gave evidence of the *post-mortem* examination, of the finding of arsenic in the stomach and intestines of deceased, and of the symptoms of poisoning by arsenic. He was asked whether a physician, by mere examination of the external surface (of the stomach), and finding indications of inflammation there, could determine with precision when the inflammation was caused. The question was objected to, on the part of the prisoner, as immaterial, incompetent and improper. The objection was overruled, and the prisoner duly excepted. After the testimony was closed, the presiding justice charged the jury at length, and no exception was taken to his charge. The jury retired, and after a protracted deliberation rendered a verdict of guilty. During their retirement, they inquired of the attending officer whether they could not render a verdict of manslaughter. They received from him an intimation that they could do so in his opinion, but were referred by him to their foreman, who thereupon sent for and consulted the Revised Statutes. They subsequently came into court, and were charged by the court that a verdict of manslaughter would not be proper under the evidence. The constables sworn to attend the jury, were also present during their deliberations. Other irregularities were alleged to have occurred, to wit: that the constables otherwise interfered with them; that the jurors saw a newspaper report of the evidence, and made a communication to the presiding justice, the failure to receive a satisfactory answer to which unfavorably affected their verdict; but these were not sufficiently proved. The defendant made a motion for a new trial to the Court of Oyer and Terminer, founded upon these alleged irregularities. The motion was denied, and the prisoner

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excepted to the decision. The prisoner was sentenced to death, but her execution was subsequently stayed, and a writ of error allowed, under which the case comes here for review. Contemporaneously with the argument of the cause, the District Attorney, on notice, moved to strike out from the case so much thereof as incorporated the affidavits and proceedings relating to the motion for a new trial on account of the alleged irregularities, as improperly in the case. The question was reserved. The other facts material to the case, are contained in the opinion, of the court.

W. J. Hadley, for the prisoner.

S. G. Courtney, for the People.

HOGEBROOM, J. Four exceptions have been presented and argued in this case, upon which a new trial is claimed for the prisoner. The first three relate to the admission of evidence on the trial, and the fourth to the refusal of the court below to grant a new trial for alleged misconduct of the jury. We will examine these in their order.

1. The prisoner having been arrested by the sheriff of Albany, and committed to the jail of that county, had a conversation with the sheriff at the jail, about a month after her commitment, upon the subject of a letter alleged to have been written by her. It was introduced by an inquiry by the prisoner of the sheriff, what he thought they would do with her, and the sheriff replied he did not know; it may be it would not be very hard with her; yet he did not know what the evidence was. She then said if she had not written a letter she would not have been there. He asked her how she came to direct a (or the) letter to Ferdinand Shultes. She said Reimann told her to direct it so. So much of this evidence as related to the letter was objected to by the prisoner, the objection overruled, and the prisoner excepted to the decision. The general rule is, that the confessions of a party are admissible evidence where called for by his adversary, upon the presumption that a party

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is not likely to state his own case more unfavorably to himself than the truth requires, and therefore should not be permitted to object to his own version of a transaction, if his adversary will take the same. In criminal cases, on account of the law's tender regard for the rights of life and liberty, it is required that it should be preliminarily shown that the confession was voluntary—not made under the influence of fear or the excitement of hope. The circumstance that the party was at the time under arrest, is a very proper one to be taken into consideration, but not of itself sufficient to exclude the evidence. It may sometimes furnish additional reason for confiding in the truth of the statement, as giving more seriousness and solemnity to the transaction. The only question in the case in such a contingency, is, is it *voluntary*? was it induced by the fear of punishment or the hope of bettering the condition of the party? was it drawn out by the act or the conduct of the opposite party? or was it made under an excitement or agitation of mind which would probably affect its verity. I am not able to see that the confession in question was obnoxious to any of these objections. The prisoner, so far as we can see, was entirely self-possessed; the arrest had not been recent; the conversation was introduced by herself; no inducements or flattering hopes were held out, unless they are contained in the declaration of the sheriff in reply to her inquiries: "It may be it wouldn't be very hard with her; yet he didn't know what the evidence was." This does not seem to have been said for the purpose of drawing out any disclosure from her, or in the expectation that any disclosure would be made, and might as naturally be expected to operate to discourage, as to invite, any communication from her. It does not seem, therefore, to have been the result of any *influence* exercised over her by the officer; nor can I see that she can be supposed to have been under such excitement or agitation of mind as would tend to discompose her or lead her to say what she did not in reality mean to utter. I think we must go the length of excluding all declarations made by prisoners when under confinement,

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or else we must regard this as proper for the consideration of the jury to receive from them such weight as it deserves.

2. The second exception relates to the admission in evidence of a letter alleged to have been written by the prisoner before her arrest. The objection was, that it was not sufficiently proven to have been her handwriting. A witness (Louisa Streit) had sworn to her acquaintance with the prisoner, and to having seen her write; to her opinion that she would know her handwriting, and that the letter in question (which was shown to her) was the prisoner's handwriting. She also testified to having seen her write a letter and two receipts, although she did not critically examine either. Independent of other evidence, I think this was sufficient to allow the letter to be read. There is no precise standard fixing the degree of knowledge which a witness must possess of a person's handwriting to be allowed to express an opinion as to the authenticity of a particular paper. The witness must have seen the party write, and acquired a knowledge, more or less perfect, of the character of the hand, and he is then allowed to express an opinion upon the paper shown. This opinion was expressed in this case, and was given *without objection*, the only objection being to the *sufficiency* of the proof to allow of the letter being read in evidence after this testimony was taken. But there was other and intrinsic evidence justifying, in connection with the evidence of handwriting, the admission of the letter. The prisoner had stated to the sheriff, that if she had not written a letter she would not have been there (in jail); and on being asked how she came to direct a (or the) letter—the witness being uncertain which expression was used—to Ferdinand Shultes, she replied, Reimann told her to direct it so. The letter spoke of her being at Dr. Wetterbee's. She was found there when arrested. It was addressed to Ferdinand Shultes. She had stated to the sheriff that Reimann had so directed her to address a letter. It was addressed on the inside to William. Such was Reimann's name. It spoke of matters in Albany. She had formerly lived there, and did so at the time of the homicide. It referred to her being in great grief and almost

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crazy, and to an unhappy disaster or misfortune having befallen her. These had a natural, if not a necessary, connection with the transaction for which she was on trial. A portion of the letter was addressed to her parents, and spoke of her mother's name being Louisa Leopold. Such in fact it was. It requested communications to be addressed to her as "Elizabeth Shuldes." Such was the name under which she was known at Dr. Wetterbee's. The signature to the letter was "Mary Theresa Koehler." Such, it subsequently appeared, was her maiden name. These and other circumstances were sufficiently corroborative of the authenticity of the letter to justify its introduction in evidence in connection with the evidence of Mrs. Streit, and abundantly authorized the jury to conclude it was hers, when this strong presumptive evidence was in no way impeached or contradicted. I cannot believe there was any error committed in this part of the case.

8. The third exception, and that principally relied on by defendant's counsel, was in allowing a question to be put to Professor Porter. I state it in the words of the case, "The counsel for the People then proposed to the witness the following question: 'In your opinion, can a physician, from a mere post-mortem examination of the exterior surface, and the indications of inflammation which he discovers, determine, with any degree of certainty, the precise period of time when such inflammation was caused?' The prisoner, by her counsel, duly objected to such question, first, as immaterial and improper; second, as incompetent. The objections were overruled, and the question permitted, and the prisoner, by her counsel, duly excepted." Under well established adjudications, these objections raised no question as to the *form* of the interrogatory, but only as to its substance. They presented no questions whether *opinions* were competent evidence upon such a subject, for the objection does not state any such specific ground, and such a ground would not naturally be inferred from the character of the objection. Much less do they convey to the mind of the court, or the opposing counsel, that the *point* of the objection was that *Professor Porter* was not one of

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the class of persons who were competent to express an opinion upon the subject matter of the interrogatory. And yet this is the principal ground upon which the force of the objection is argued. It is obvious no such question was raised on the trial; and therefore it cannot be presented here. It is not fair to urge that great liberality should be exercised in cases of this magnitude and importance in interpreting the intent of the objector. We must try this matter by the ordinary rules of evidence. Justice requires that the objection should be explicit and clearly intelligible to the court and the opposite party, because only in such case can it be intelligently disposed of by the court, and only in such case can it, if seen to be well founded, be obviated by a withdrawal or change of the question, or by the introduction of additional evidence by the opposite party. (*People v. Dalton*, 15 Wend., 585, 586.)

We must therefore confine our attention to the substance of the offered evidence, and determine whether it was immaterial, improper or incompetent. I think it was neither, for the defendant had already introduced evidence on the cross-examination of a former professional witness of the prosecution (Dr. Reinhart), tending to show that, in his opinion, the irritating matter must have been administered some two months before death; and that the appearances upon the dead body could not be produced by arsenic administered within three days of the time of the death. As the latter was substantially the theory of the prosecution, it became important for them to show that this opinion of Dr. Reinhart was incorrect, and the question objected to had a direct and legitimate tendency, if answered in the negative, to lead to such a result. It cannot, therefore, be said to have been immaterial, incompetent or improper, and the objection, if tested, as it must be, on its merits and fair meaning, was properly overruled.

But assuming that the objection was broad enough to present the questions argued under this exception, I think, in the first place, that the subject matter of the question was one upon which a professional man or expert might rightfully be called upon to express an opinion. Whether a post-mortem

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examination of the exterior surface of the stomach would enable a professional man to determine accurately when the inflammation supervened, was not a matter as to which unlearned persons or ordinary men could speak with confidence or reliability. It depended upon experience, or familiar acquaintance with the parts affected, their constitution and properties. It was beyond the range of ordinary knowledge. The parts affected were in the living body, hidden from view, and the effect upon them of such an irritating substance as arsenic, administered internally, and the precise time when these effects would be first visible in the form of inflammation upon the exterior surface of the stomach, were matters wholly beyond the range of ordinary knowledge or observation, and peculiarly within the scope of the comprehensive knowledge, large experience and close observation of the scientific man.

So also, if, by an extraordinary stretch of liberality, the objection can be supposed to mean that Professor Porter's profession or precedents had not qualified him to express an opinion upon the matter embraced in the question, I regard the objection as untenable. To answer the question intelligently, would require a knowledge of the nature and properties of the stomach, of the foreign substance introduced into it, and of the effect of contact or combination between the two. I regard this as in an eminent degree within the province of the chemist, whose legitimate profession is to inquire into the nature and properties of matter, and of a combination or union between the elements of which different substances are composed. A chemist, therefore, would, I think, be quite as competent to answer such a question intelligently and satisfactorily, as a physician whose appropriate business was to cure and remove disease. This might require a knowledge of the nature and constitution of the affected part, and of the foreign ingredients introduced into the stomach. And I do not deny that a *physician* would be competent to answer the question. But his competency would arise quite as much from the knowledge of chemistry, which is essential to make the skillful and accomplished physician, as from any other department of medical

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science. But if it were necessary that Professor Porter should be a physician in order to make him competent to answer the question, I think the case shows him to belong to that profession, or at least to have the knowledge requisite in that department of science to solve the inquiry propounded. It is conceded and expressly proven that he was a professor of chemistry. It is further proved that he had had experience in *post-mortem* examinations, with a view to the detection of poison; that he could determine whether arsenic was placed in the stomach before or after death. He testified, without objection, that a portion of the arsenic was, in his opinion, removed by purging and vomiting, and absorption into other organs; that the person died from the effects of the arsenic; that he could and did form an opinion as to the length of time that elapsed between the administration of the arsenic and the death, and that it was administered not long before death; that arsenic was a soluble poison; that his *profession* led him to become acquainted with the symptoms of poisoning by arsenic, which symptoms he details, as also the quantity necessary to produce death; that, among other things, inflammation of the stomach and of the smaller intestines, and also of the œsophagus, would be likely to ensue. Now, several of the matters here detailed are founded purely, or at least principally, upon medical, in distinction from merely scientific or chemical knowledge, and would scarcely have been allowed to be stated without objection, unless it had been known or assumed that the witness was a physician or medical man. At all events, they evince precisely the kind of knowledge which, as applied to such a question, a physician would be expected to have or require. The witness is, therefore, shown by the evidence to possess the knowledge and skill belonging to the profession of a physician, and must be regarded as competent to pronounce such opinions upon this subject as physicians are competent to do. But it is said that, by the question, one physician was, in effect, called upon to pronounce upon the competency or scientific attainments of another, and that this was improper. But the question does not assume that

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aspect, and is not presented in that form. The question is general: Can a physician—can *any* physician—or person skilled in that department of scientific knowledge, determine the precise period of access of inflammation? Is it possible, in your opinion, to do so? The answer to this might be a *disagreement* with the previous witness; but that would not render the question improper. Such questions are of every day occurrence, and it is proverbial that “doctors disagree.” But there was nothing that I can discover, in the form or scope of the interrogatory, that makes it justly obnoxious to this last named charge. In every aspect, therefore, in which this exception can be examined, I regard it as untenable. These exceptions embrace all the matters which respect the admission or rejection of the evidence at the trial, or the instructions of the court to the jury, and I think all which are the legitimate subjects of exception.

4. But the defendant's counsel have taken and argued a fourth exception, to wit: to the refusal of the Court of Oyer and Terminer to grant a new trial for alleged misconduct of the jury. This alleged misconduct consists of several particulars. 1. That the jury, during their deliberations, improperly possessed themselves of a copy of the Revised Statutes, and consulted the same. 2. That in like manner they obtained and consulted a newspaper containing a report of part of the evidence. 3. That the officers having the jury in charge, were present all or most of the time during their deliberations. 4. That the verdict was rendered under the improper expectation that the prisoner would never be executed. 5. That the jury improperly sent a communication to the presiding judge without the knowledge of the accused or her counsel, or of the other members of the court. The application to set aside the verdict upon these grounds, was properly made to the court which tried the prisoner, and was refused by them, as to the second, fourth and fifth objections, upon the ground that they were unsupported by sufficient evidence and unfounded in fact; and as to the first and third objections, that no actual detriment ensued to the prisoner, inasmuch as though one or

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more of the officers were in the room, no improper communication prejudicial to the prisoner took place between them and the jury, and that although the jury did, at one period of their deliberations, examine portions of the Revised Statutes touching the offences of murder and manslaughter, they subsequently appeared in court and were specifically and imperatively instructed by the court as to the nature of those offences and the discrimination between them.

I do not regard it as essential to travel over the entire evidence relied upon to establish the existence of these irregularities. I concur in the conclusions to which the court below arrived in regard to them on the questions of fact. This disposes of the second, fourth and fifth objections, without the necessity of further remark. The first and third specifications were charges of mere irregularities—censurable ones it is true, but not resulting in any actual prejudice to the prisoner; and I think we may safely dispose of them on that ground, expressing our concurrence in the views of the court below upon those points. (*People v. Hartung*, 17 *How. Pr. Rep.*, 85; *Baker v. Simmons*, 29 *Barb.*, 198; *People v. Carnal*, 1 *Park. Cr. R.*, 256.) But it may be proper to say that we do not regard these irregularities as the subject of exception, so as to present them for review in this court. Exceptions properly relate only to matters of law arising upon the trial of the cause. The law expressly limits the taking of exceptions to matters occurring at the time of the trial. (2 *R. S.*, 736, § 21; *Ib.*, 422, § 78.) The subject has been frequently before the courts, and the decisions, so far as I know, have been uniform against entertaining jurisdiction to review any errors except such as occurred strictly at the trial. (*People v. Haynes*, 11 *Wend.*, 561; *People v. Dalton*, 15 *Wend.*, 583; *Freeman v. The People*, 4 *Den.*, 21; *Wynehamer v. The People*, 2 *Park. Cr. R.*, 382.) These decisions are to the effect of excluding everything from the consideration of the court of review, except what occurs in the progress of the trial, and on the trial of the main issue. No matters which either precede or follow the trial are subjects of exception. Thus, in *The People v. Haynes*, objections that

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the verdict was against evidence, and that the court erred in their comments upon the testimony, were disregarded. In *The People v. Dalton*, objections to the insufficiency of the evidence to make out the crime, and a motion in arrest of judgment, were disposed of in the same way. In *Freeman v. The People*, the same disposition was made of exceptions taken on a preliminary issue to test the insanity of the prisoner. In *Wynehamer v. The People*, decisions made on a motion to quash an indictment, on the grounds of irregularity in organizing the grand jury, and on the trial of an issue joined on a challenge to the array of jurors, were held not to be reviewable on a bill of exceptions; and although in the case of *Eastwood v. The People* (3 *Park. Cr. R.*, 25), affidavits were allowed to be read, and were considered in the Supreme Court, when the case came there on a bill of exceptions from the Monroe County Oyer and Terminer, no objection was taken to their being so read, and the question of their admissibility was not considered. (See page 27 and Reporter's note a.) The fact that Courts of Oyer and Terminer now entertain motions for new trials, furnishes no reason for sustaining an exception to their decision in the disposition of such motions. We cannot enlarge the statute, and the decision of motions of this character, so far as they concern the weight of evidence or questions of irregularity, were never reviewable on exception or writ of error in a superior tribunal. (*The People v. Haymes*, 11 *Wend.*, 562; *Pelletreau v. Jackson*, 7 *Wend.*, 471; *The People v. Rathbun*, 21 *Wend.*, 546 to 551.) This court, therefore, sits only to review matters of law, and not to correct all irregularities which attach to the proceedings in the court below. These last pertain more especially to the orderly conduct of the cause in the tribunal of original jurisdiction—are mostly matters of practice, and some of them were matters of discretion, and all of them presumed to be controlled and directed by the trial court, in a manner to subserve the ends of justice. It would be intolerable if every alleged irregularity was susceptible of review in the appellate tribunal. It would involve a vast consumption of time and a vast increase of expense. Hundreds

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of questions are every day disposed of in every court, and in this court at the circuit and special term, which can never go further. A proper degree of confidence must be entertained in the ability and willingness of courts of original jurisdiction, properly and justly to dispose of the questions presented to them. Litigation must cease at some point, and we should accomplish in fact a less amount of practical good if we allowed parties to carry up to our highest tribunals every debateable question presented in the progress of the whole proceedings. It is sufficient to say that the law countenances no such course, and the practical remedy must be, where, notwithstanding all these precautions apparent and serious injustice has been done, by an appeal to the pardoning power. This will probably be found to be an ample and efficient remedy, when the emergency of the case requires its application. If we are right in these views, that part of the case which contains a history of the proceedings, so far as it is intended to show the misconduct of the jury, has no proper place there, and the motion to strike the same out of the case should be granted. A bill of exceptions should contain no more of the case than is necessary to present the questions of law actually raised, and which are the legitimate subjects of exception. But as the question is pressed with much confidence by the learned counsel for the defendant, and the issue is one of vast importance to the prisoner, we allow the matter sought to be expurgated to stand, notwithstanding our clear opinion that it forms no proper part of the case, to enable the prisoner, if she is so advised, to present the questions to the court of final resort.

We have given to this case a careful and deliberate examination, and are brought to the conclusion that no error of law, to the actual prejudice of the prisoner, has been committed. Her remedy, if any exists, lies elsewhere; and while we may commiserate her unfortunate condition, as we should that of any of her sex similarly circumstanced, however guilty, we are not at liberty to interpose any obstacle to the due execution of the law. The judgment of the Court of Oyer and Terminer must be affirmed, and the record and proceedings remitted

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to that tribunal, with directions to enforce the judgment of this court.

GOULD, J., concurred.

WRIGHT, J. (Dissenting.) I am not able to agree with my brothers, *Hogeboom* and *Gould*, that it was not error in allowing the question to be propounded to and answered by Professor Porter. The question was: "In *your* opinion, can a physician, from a mere *post-mortem* examination of the exterior surface, and the indications of inflammation which he discovers, determine, with any degree of certainty, the precise period of time when such inflammation was caused?" The prisoner's counsel objected to the inquiry, *first*, as immaterial and improper; *second*, as incompetent. The court overruled the objection, and the witness answered in the negative.

It is now said that the specific objections were not taken, either that the opinion of the witness upon the subject matter of the inquiry was not competent evidence, or that the witness had not been shown to be qualified to express an opinion upon such subject matter. In a case of this magnitude, I am not inclined to enforce a technical rule with rigid strictness. It ought not to be that human life should depend, in any degree, upon the skill and adroitness of counsel in stating objections. Although, in the humane spirit of our criminal jurisprudence, we allow a prisoner to be defended by counsel, and oftentimes, as in this case, assign counsel for that purpose, yet the court is not thereby relieved from the responsibility once resting upon it, to see that no objectionable evidence is received to the prejudice of the accused, or that no injury results from the unskilfulness of counsel. Besides, if the objection cannot be obviated, or the testimony made competent by additional proof, the rule does not apply.

There was no evidence that the witness Porter was, or ever had been, a practitioner of medicine, or that he had familiarized himself by study or practice with the mysteries of the healing art. He was a professor of chemistry, but a knowledge

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of chemistry is but one of many qualities that make the *physician*; and it does not necessarily follow that a chemist is familiar with the structure and properties of the human system.

It is possible, however, that the objection that he was not of the medical profession, might have been obviated by additional proof; but had this been done, if the opinion, even of a physician, was incompetent, it would be covered by the general objection of incompetency. No one will pretend, that unless the opinion asked was exclusively upon a scientific subject on which it was important that the jury should be enlightened, that it was material or competent.

The purpose of the interrogatory is obvious from the case. It was not to elicit information on a scientific question beyond the range of ordinary knowledge; but if the witness answered in the negative (as he did), to impress the jury with the conviction that from the imperfect nature of the *post-mortem* examination, the opinion of Dr. Rheinhart (who had made it), that the irritating matter which caused the death of Hartung must have been taken into the stomach two months before death, was unreliable. It was not the intention to enlighten the jury upon any matter of science with which they were not supposed to have familiarity. The nature and subtlety of arsenic or other poisons, in the organism of the stomach and œsophagus, were not inquired into; in short, nothing from which it might be inferred by the jury that the mere observance of inflammation on the exterior surface of the parts affected, would not enable the man of science to approximate to the period of time when such inflammation commenced. The witness had been put in possession of the parts affected immediately after the *post-mortem* examination, with full opportunity to observe their appearances and the extent of inflammation; but it is to be observed, that he was not asked, as an expert, whether, from indications of inflammation that he discovered, he could "determine, with any degree of certainty, the precise period of time when such inflammation was caused." He had already substantially answered this question, and expressed the opinion that the irritating matter adminis-

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tered to the deceased was arsenic, and that death must have ensued within a very few days. Nor was the inquiry, whether a physician, under any circumstances, could determine with proximate accuracy when the inflammation caused by irritating matter taken into the stomach commenced, but whether a physician, from the indications of inflammation which he may discover upon a *post-mortem* examination of the exterior surface of the stomach, intestines, &c., can determine it. Dr. Rheinhardt had been called by the prosecution, and testified that he was a practising physician and surgeon, and had made a *post-mortem* examination. On his cross-examination, he stated that, in his opinion, the irritating matter which caused the death of Hartung, had been taken into the stomach two months before death. On re-examination by the prosecution, he testified that he was familiar with the appearances produced by arsenic, and that the cause of Hartung's death was inflammation of the cesophagus and stomach. In answer to a question from the court, he stated that the appearances which he observed could not have been produced by arsenic administered within three days of the time of the death, and that such appearances were sufficient of themselves to produce death.

Rheinhardt's theory obviously was, that Hartung had died from the administration of a slow poison. This was antagonistic to the theory of the prosecution, which was, that he died from the administration of arsenic by the prisoner, which had been purchased by her within three days of her husband's death. It had been proved that she purchased arsenic from a druggist in Albany upon a single occasion, which was the Sunday prior to the death, which occurred on Wednesday.

It had been shown that she attended upon her husband in his last illness.

Professor Porter testified that he had found six grains of arsenic in two-thirds of the stomach of the deceased, and expressed the opinion that Hartung died from the effects of arsenic taken, and from the quantity found, that he could not have lived long; it might have been one day or several days. This proof tended strongly to sustain the theory of the prose-

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cution, that the death was occasioned by arsenic, and that the prisoner was a guilty participant in the administration of it. But if any force or effect was to be given by the jury to the opinion and testimony of Rheinhart (though the death may have been occasioned by arsenic), it went far to relieve the prisoner from the crushing weight of the inference to be drawn from the fact that she had purchased arsenic within three days of the death.

This was the strongest and most conclusive circumstance connecting her with the killing. In fact, unless the jury believed that arsenic was administered in such quantities as to have produced death within three days, the evidence would not have justified her conviction. There was no pretence that she had purchased or procured arsenic at any other time than the Sunday prior to the death. If the irritating matter which had caused Hartung's death was taken into the stomach two months before dissolution, or if the appearances which Rheinhart observed could not have been produced by arsenic administered within three days of the time of the death, it went far to relieve the case of the strongest circumstance tending to connect the prisoner with the transaction. This evidently was seen by the prosecution, and it was deemed important to discredit the testimony of Rheinhart. Professor Porter was interrogated in respect to the symptoms of poisoning by arsenic, and, although not shown to have ever studied or practised physic, the appearances of death by poison. The examination was allowed to proceed without objection, though, so far as a description of appearances was concerned, it amounted to nothing. He could not certainly tell whether there would be inflammation of the stomach and the smaller intestines, and he presumed, though he could not speak with certainty, that the œsophagus would be inflamed; yet it is urged now that this examination showed the witness to have been a medical expert. It was then that the objectionable interrogatory was propounded to him. It was manifestly pointed at Dr. Rheinhart. He had made the *post-mortem* examination; and in any view other than to discredit his testimony, the inquiry was immaterial and im-

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pertinent. The expression of an opinion whether a physician, from the discoveries of inflammation he might make on a *post-mortem* examination, could or could not determine, with any degree of accuracy, when the inflammation was caused, was entirely irrelevant and foreign to the case on trial, unless pointing to the *post-mortem* examination of Rheinhart.

If there had been no *post-mortem* examination, and Dr. Rheinhart had expressed no opinion as to when the inflammation which he discovered had commenced, it can scarcely be pretended that there would have been any pertinency or materiality in the inquiry. The interrogatory was, therefore, aimed at Rheinhart, and with no other purpose, that I can conceive, but to discredit his testimony with the jury, not on the ground of his incompetency as a physician, nor on the further ground that it was not within the scope of medical science, by close and skilful examination, to determine when inflammation was caused with proximate accuracy, but on the ground that the imperfect and hasty examination which he had given the subject, did not qualify him to express a reliable opinion as to when the irritating matter, which had caused the inflammation of the cesophagus and stomach, had been administered. In no other light was it at all important. Conceding the witness to have been an expert, it was not necessary for the information of the jury that one expert should be called to express the opinion that another expert, from an imperfect and hasty examination of the surface of the inflamed parts, and from the indications of inflammation which he may discover on such an examination, could not determine, with any degree of certainty, the precise period of time when the inflammation commenced. It required no medical expert to enlighten a jury of unlearned men on this point, nor was it important to a proper determination of the cause of Hartung's death. It was a fact (if there was any importance attached to it), that the jury were abundantly able to determine for themselves, after being instructed in the constitution and properties of the parts affected, and the nature and properties of the irritating matter administered internally; and above all, it required not the

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skill of an expert to satisfy even an ordinary man that an imperfect and careless examination, even of a skilful and learned physician, would not conduce to accuracy of opinion or judgment.

I am of the opinion that the interrogatory was objectionable for the reasons:

1st. That it called for the opinion of a witness not shown to be a medical *expert*; and, 2d. That even the opinion of an expert, as to the subject matter of inquiry, was incompetent evidence.

Though the witness may have been, and doubtless was, eminent as a chemist, it did not necessarily follow that he was an anatomist or physiologist; nor are the *opinions* of experts always competent evidence. Ordinarily, the jury are to find the facts bearing on the issues involved in the case, and form their own opinions and conclusions. Only in cases where, from the nature of the subject, facts disconnected from opinions cannot be so presented as to enable them to pass upon the question with the requisite knowledge and judgment, are persons of skill allowed to give their opinions in evidence. (*Jefferson Insurance Company v. Othel*, 7 Wend., 78.) The opinion of a physician, upon a question not involving medical skill or science, is not admissible evidence; and when the jury, after being put in possession of the facts, can judge equally well with the witness, it is not a case for an expert. (*Wooden v. The People*, 1 Park. Cr. Rep., 464.) Assuming the inquiry to have been in this case, whether a physician was competent to determine when inflammation commenced, the reasons stated by the witness Porter, and upon which he based his opinion, clearly showed that the question put to him was not a scientific one. These reasons were because "different substances might be used, which would produce more or less quickly, and to a greater or less extent, the inflammation." The facts there stated would enable the jury to pass upon the question of competency, without the aid of opinion. They were reasons which one intelligent man could understand and appreciate as well as another, and furnished the jury with all the knowledge that

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they required to draw the requisite conclusion. Under such circumstances, the aid of the opinion of an expert was not required; and if not, such opinion was inadmissible.

But the interrogatory was restricted to the case of a physician who merely made a *post-mortem* examination, and relies upon an imperfect and meagre examination of the exterior surfaces of the parts inflamed; and in this view, if the inquiry was a scientific one in part, it was not wholly so. If the *capacity* generally of the medical profession be the proper subject for the opinion of an expert, the inquiry should not be limited to the case of a physician who exercises his profession under peculiar circumstances, and when the jury are quite as well able as the expert to determine whether such circumstances do or do not conduce to accuracy of opinion or judgment. But the *competency* of the medical profession, under any circumstances, is not, in my judgment, ever to be determined by the opinions of experts. Opinions are only admissible when the nature of the inquiry involves a question of science or art, or of professional or medical skill, and then only from witnesses skilled in the particular business to which the question relates. This was not a case in which the adage that "doctors are dangerous" has any real application.

In *Leighton v. Sargent* (11 *Foster*, 119), upon a question made as to the degree of skill possessed by a surgeon, the Supreme Court of New Hampshire held that the opinions of physicians were not competent evidence upon that question, and that opinions are never to be received when it is supposable that jurors can form a correct judgment without the aid of the opinions of others, from the facts being stated to them. Witnesses should never be allowed to usurp the province of the jury, except from necessity. In the present case, the witness was not asked whether *he*, as a physician, could reach any conclusion upon the subject matter of the inquiry, for, as regarded himself, he could speak with positiveness, but, substantially, whether the medical faculty, with full knowledge of the structure of the stomach and other parts affected, and the more or less irritating properties of different poisons, could determine,

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with any degree of certainty, from an examination of the exterior surface of the inflamed parts, when inflammation commenced. Then the witness was asked to sit in judgment on the skill and capacity of the medical faculty in general, and Dr. Reinhart in particular, for the benefit and information of the jury. I think it will be difficult to find any precedent for such an inquiry, and I am at a loss for any sound or safe principle on which to rest it. It is begging the question to say that the fact sought to be elicited was one of science bearing on the issues in the case, and without the range of ordinary knowledge, and which the jury were to be supposed incapable of finding without the aid of a professional opinion.

It is urged by the counsel for the defendants in error, that the question and answer, if improper, was really unimportant in the case, and worked no injury to the prisoner. I cannot see the matter in this light, nor do I understand my brethren to question the materiality of the evidence. Professor Porter and Dr. Reinhart had evidently opposite theories respecting Hartung's death—the latter, that he died from the slow administration of poison; the former, that his death was caused by administering arsenic in such quantities as to produce death within one, two or three days.

The prosecution seems to have leaned towards both of these theories in the progress of the trial. When Professor Porter came to testify that he had found some six grains of arsenic in two-thirds of the stomach of the deceased, and that three or four grains had been known to produce death, if the evidence was credited the inference became almost irresistible that the deceased was poisoned by arsenic, and that a sufficient quantity had been administered to produce death in a very brief period of time. If the testimony of Dr. Reinhart was to be credited (and he was put on the stand as a witness by the prosecution), the appearances which he observed could not have been produced by arsenic administered within three days of the time of the death, but the irritating matter of which the deceased died must have been taken into the stomach two months before death. It was not pretended or shown that the prisoner had

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purchased arsenic at any other time than the Sunday prior to the death. This circumstance lost much of its weight if the death was not occasioned by arsenic administered within three days of the time of dissolution. The tendency of Dr. Reinhart's testimony, if worth anything, was to relieve the prisoner from the weight of the inference to be drawn from the fact that she had purchased arsenic three days before the death of her husband. The theory was, that the death was effected by the very poison that she had procured at the druggist's three days previously. If Reinhart was correct in the opinion which he expressed, the fact that the prisoner purchased arsenic shortly before the death of her husband, lost much of its weight and significance.

The effect of the opinion of Professor Porter was to deprive her of the benefit of the opinion of the physician in her favor. It told the jury, in effect, that the physician was not capable of forming the opinion that he had expressed. At all events, the evidence was calculated to make that impression on the minds of the jury, and it is impossible to say that it did not influence the verdict.

Upon the ground stated, I am in favor of reversing the judgment of the Oyer and Terminer. I think there was error, and it is easily to be seen that the prisoner may have been prejudiced thereby.

There was an application made to the Oyer and Terminer for a new trial, on the ground of irregularity and misconduct of the jury, and the officers attending them. The motion papers show that one of the jurors inquired of a constable in attendance whether the jury could bring in a verdict of manslaughter, stating that if they could do so the whole jury would agree on such a verdict. The constable replied that he thought they could, adding that they had better consult their foreman, who, being a justice of the peace, would probably know. Subsequently, the Revised Statutes were sent for by the jury, and such parts thereof as related to the crimes of murder and manslaughter examined. On Sunday evening (after the jury had been out more than twenty-four hours), one of the jurors for-

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warded to the presiding judge a written communication of this tenor: "If the annexed question can be answered in the affirmative, then will you be kind enough to convene the court and answer such question, and receive our verdict, otherwise return this note. 'Q. If the jurors, after the most careful and laborious investigation, are *absolutely unable* to find which of the inculpated parties is most guilty, then can a verdict of not guilty be rendered in this case?'" The court was not convened until the next morning, when the jury stood equally divided upon the question of the prisoner's guilt; and after being told by the presiding judge that he could conceive of no aspect of the testimony in the case that would warrant them in finding any other verdict than guilty or not guilty of the crime with which the accused was charged, and that a verdict of manslaughter would not be sustained by the evidence, they again retired, and returned in a few minutes with a verdict of guilty. During the deliberations of the jury, one or more of the three constables, sworn to attend them, were constantly present in the jury room. The eminent judge who presided in the Oyer and Terminer, well characterized the proceeding on the part of the jury, in consulting with a constable as to the law, and then sending for and examining themselves the provisions of the Revised Statutes in relation to the crimes of murder and manslaughter, as a reprehensible irregularity. The court, however, arrived at the conclusion that no injury had resulted from it to the defendant, and that the verdict had not been affected in the least degree by the impropriety of the jury in seeking to inform themselves as to the law, and finding no other charges of misconduct sustained by proof, denied the motion for a new trial. We are now asked to review this decision. I think that we are without the power to review it. We cannot review the action of a Court of Oyer and Terminer in granting or refusing a new trial on the merits, or on the ground of misconduct of the jury, but are confined to errors of law appearing on the record or in the bill of exceptions. The motion papers in the Oyer and Terminer, I think properly form no part of the record. It is for this reason alone that I refrain

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from discussing the merits of this question. My brethren think that the motion was properly decided, and very probably it was; but I may say this for myself, that where a jury was shown to be guilty of the glaring misconduct of advising with a constable as to the law of the case, and examining for themselves the statutory provisions relating to the offences of murder and manslaughter, though subsequently instructed by the court as to these matters, I should hesitate long in coming to the conclusion that the accused could not possibly be prejudiced thereby, and hence that such misconduct was insufficient to vitiate the verdict.

Judgment affirmed.

NEW YORK OYER AND TERMINER. February, 1860. Before *Ingraham*,
Justice of the Supreme Court.

THE PEOPLE v. MORTIMER SHAY.

On a motion for a new trial made before the Oyer and Terminer, after a conviction for murder, on the ground that the verdict was against evidence, the following facts appeared: The deceased and one Smith were quarrelling, when the prisoner interfered and struck the deceased the first blow on the head; the blow was returned by the deceased, who then retreated, followed by the prisoner. The prisoner secretly opened his knife, whereupon the deceased again struck at the prisoner, and again retreated. The prisoner then struck the deceased with the knife, and cut him in the face. The deceased continued to flee, and the prisoner was approaching the deceased, when Kirby ran in between them. The prisoner then struck at Kirby with the knife, but the latter jumped out of the way, and the prisoner followed the deceased. One of the brothers of the deceased called out to him to take care or he would be killed, and as the deceased looked around to see his danger, the prisoner struck the knife into his temple with such force, that after three unsuccessful attempts to draw it out, he fled, leaving the knife sticking in the head of the deceased. The death of the deceased was caused by the last blow. It was *held* that these facts were sufficient to warrant the conclusion that the prisoner had formed the determination to take the life of the deceased before he struck the last blow, and a new trial was denied.

On the 2d day of February, 1860, the defendant was convicted in this court of the murder of one John Leary. A motion was made for a new trial, on the ground that the verdict was against evidence. The facts sufficiently appear in the opinion of the court.

Henry L. Clinton, for the defendant, made the following points:

I. This court possesses the power to grant new trials upon the merits. (*People v. Stone*, 5 *Wend.*, 39; *People v. Morrison*, 1 *Park. Cr. R.*, 625; *People v. Carnel*, 1 *Park. Cr. R.*, 256; *People v. Court of Sessions of Wayne County*, 1 *Park. Cr. R.*, 370.)

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II. The verdict in this case is contrary to law, and overwhelmingly against evidence.

From the undisputed facts in the case, and on the testimony for the prosecution, taking it in its worst phase against the prisoner, no more than a case of manslaughter was proven. The death of the deceased occurred in a sudden affray, the prisoner and deceased having exchanged blows before any knife was used by the prisoner; there being no evidence of any old grudge or ill-feeling on the part of prisoner towards deceased prior to this sudden combat.

It appears from all the evidence in the case, that during the affray no one except the deceased used any violence upon the prisoner. The latter was stabbed during the affray, and it was observed by the officer when he got him to the station house, that he was bleeding from behind the ear. That he had been cut there appears from the testimony of Spencer, Ellen Connolly and officer Sherlock. It appears from the whole evidence of the prosecution, that no blow was struck by prisoner or deceased after the former had inflicted the fatal stab upon the latter. This being so, it follows inevitably that the deceased previously cut the prisoner.

Even had the deceased stabbed the prisoner after he (deceased) had received the fatal blow, this would demonstrate that the deceased had a knife upon that occasion, with which he fought the prisoner. He must have had it open and used it before, for it is not at all probable that after he himself had been fatally stabbed, and the knife stuck in his temple, he could coolly take out his own knife, open it, pursue the prisoner and stab him.

Upon the facts appearing in the evidence, the law clearly and unmistakably fixes the offence as no more than manslaughter. From those facts the law presumes the absence of premeditated design or malice aforethought, and it has been so adjudged, repeatedly and uniformly.

Whether certain facts amount to a sufficient provocation to reduce the crime of killing from murder to manslaughter, is a question of law. (*State v. Craton*, 6 *Iredell*, 164.)

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What is a sufficient provocation to make that which would otherwise be murder, a less offence, is a question of law. (*State v. Durno*, 18 *Miss.* ; 8 *Bennett*, 419.)

The fact that the prisoner interfered in the quarrel or fight between the deceased and Smith, makes no difference, so far as the question of manslaughter is concerned.

"And of the like offence [manslaughter] shall he be adjudged guilty, who, seeing two persons fighting together in a private quarrel, whether sudden or malicious, take part with one of them and kills the other." (1 *Hawk. Pl. C.*, ch. 81, 125.)

"Where the third party interferes from hot blood alone, and kills one of the combatants, this is mere manslaughter." (*Whar. on Hom.*, 211.)

"A party of men were playing at bowls, when two of them fell out and quarrelled, and a third man, who had not any quarrel, in revenge of his friend struck the other with a bowl, of which blow he died; and this was held manslaughter, because it happened on a sudden motion in revenge of his friend." (*Whar. on Hom.*, 202.)

It is not important, in the legal aspects of the case, whether prisoner struck the first blow.

In 1 *East's Pl. Crown*, 241, the author says: "But there is another class of cases where the degree or species of provocation enters not so deeply into the merits of them as in the foregoing. And those are, where, upon words of reproach, or indeed upon any other sudden provocation, the parties came to blows, and a combat ensues, no undue advantage being taken or sought on either side, if death ensue, this amounts to manslaughter. And here it matters not what the cause be, whether real or imagined, or *who draws or strikes first*."

In *Foster's Crown Law*, 295, the author observes: "A. useth provoking language or behavior towards B.; B. striketh him, upon which a combat ensueth, in which A. is killed. This is holden to be manslaughter, for it was a sudden affray, and they fought upon equal terms; and in such combats upon sudden quarrels, it mattereth not who gave the first blow."

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From the fact that the prisoner used a deadly weapon, the law raises no presumption in favor of murder and against manslaughter.

In 1 *East's Pl. Crown*, 288, it is said: "And it has been shown that in the case of a legal provocation, strictly so considered, this heat will extenuate the guilt of the party acting under its adequate influence, *even though he made use of a deadly weapon.*"

If two fight with deadly weapons in a mutual combat, begun in hot blood, and death ensue, it is manslaughter. (*United States v. Mingo*, 2 *Curtis C. C.*, 1.)

If the deceased assail the prisoner with insulting words and blows, and without the use of any weapon, and the prisoner, without attempting to evade the fight, killed deceased with a deadly weapon, he is guilty of manslaughter. (*Atkins v. State*, 16 *Ark.*, 568.)

"Any assault in general, made with violence or circumstances of indignity upon a man's person, if it be resented immediately by the death of the aggressor, and it appear that the party acted in the heat of blood upon that provocation, will reduce the crime to manslaughter; and the same rule would apply, says Lord Hale, if, when A. and B. were riding on the road, B. had whipped A's horse out of the track, and then A. had alighted and killed B." (*Wharton's Law of Homicide*, 186.)

Where the defendant, having been violently beaten and abused, made his escape, ran to his house eighty yards off, got a knife, ran back, and on meeting with the deceased, stabbed him, it was held but manslaughter; but it was said that if, on the second meeting, the defendant had disguised the fact of having a weapon for the purpose of inducing the deceased to come within his reach, it would have been murder, such concealment affording ground for the presumption of deliberation. (*State v. Norris*, 1 *Hay.*, 429.)

Where, in New York, the prisoners, three women, each of them armed with clubs, had fallen into a quarrel with the deceased, who was also armed with a club, and had been chased by him for some distance till he stopped, upon which

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one of them turned round and gave him a mortal blow, it was held manslaughter. The indulgence which the law extends to cases of this description, is founded on the supposition that a state of sudden and violent exasperation is generated in the affray, so as to produce a temporary suspension of reason, and that the transport of passion excludes the presumption of malice. (*People v. Garretson, et al*, 2 *Wheeler's C. C.*, 847; *U. S. v. Thayer, U. S. Cir. Court*, 2 *Wheeler's C. C.*, 503.)

No words or gestures, however irritating, will justify a killing, although they may reduce the offence from murder to manslaughter. (*U. S. v. Wittberger*, 8 *Wash. C. C.*, 515.)

Where a person, on being struck a heavy blow with the fist, a moment after stabbed his assailant with a deadly weapon, it was held that if death had ensued, it would have been manslaughter only. (*The State v. Yarbrough*, 1 *Hawks.*, 78; *The State v. Jackett*, 1 *Hawks.*, 210.)

* The law does not put an act done upon a sudden impulse, and in the heat of passion, on the same footing, in regard to guilt, with a deed deliberately performed. This indulgence proceeds on the supposition that the reason or judgment of the party perpetrating the act has been temporarily suspended or overthrown by the sudden access of violent passion. (*Preston v. The State*, 25 *Miss.*, 388.)

If a party committing a homicide acted under very great provocation, and if all the circumstances of the killing show that it was from a sudden, violent heat of passion, occasioned by such provocation, and not from the promptings of an abandoned and malignant heart, although there was no assault first made upon him by the person killed, it will be a case of voluntary manslaughter. (*Stokes v. State*, 18 *Geo.*, 17.)

If the deceased assailed the prisoner with insulting words and blows, and without the use of any weapon, and the prisoner, without attempting to evade the fight, killed deceased with a deadly weapon, he is guilty of manslaughter. (*Atkins v. State*, 16 *Ark.*, 568.)

A., the son of B., and C., the son of D., fall out in the field and fight. A. is beaten, and runs home to his father all bloody.

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B. presently takes a staff, runs into the field, being three-quarters of a mile distant, and strikes C. that he dies. This is not murder in B., because done in a sudden heat and passion. (1 *Hdle*, 458.)

If A. and B. fall suddenly out, and they presently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and A. kills B., this is not murder, but homicide, for it is but a continuance of the sudden falling out, and the blood was never cooled; but if there were deliberation, as that they meet the next day, nay, though it were the same day, if there were such a competent distance of time that in common presumption they had time of deliberation, then it is murder. (1 *Hale*, 458.)

If a person upon meeting his adversary unexpectedly, who had intercepted him on his lawful road, and in his lawful pursuit, accepts the fight, when he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping him on the way, and it would be manslaughter. (*Copeland v. State*, 7 *Humph.*, 479.)

If two fight with deadly weapons in a mutual combat, begun in hot blood, and death ensue, it is manslaughter. (*U. S. v. Mingo*, 2 *Curtis C. C.*, 1.)

A. presented a gun at B., and subsequently took it down. B. then said that if he raised it again he would throw a brickbat at him. He did again raise it, the brickbat was thrown, and B. was shot. Held, that in consideration of the threat or banter of B., such killing may have been no more than voluntary manslaughter, and that it was error in the court below to charge that "if the first presenting of the gun was with malicious intent, notwithstanding what followed, the killing was murder." (*McGuffie v. State*, 17 *Geo.*, 497.)

But, though words of slighting, disdain or contumely, will not of themselves make such a provocation as to lessen the crime into manslaughter, yet it seems that if A. give indecent language to B., and B. thereupon strike A., but not mortally,

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and then A. strike B. again, and then B. kill A., that this is but manslaughter. The stroke by A. was deemed a new provocation, and the conflict a sudden falling out; and on these grounds the killing was considered only manslaughter. (1 *Hale*, 455.)

In the case of *R. v. Hayward* (6 *Car. & P.*, 157), it was held that if, in a case of stabbing, the jury are of opinion that the wound was given by the prisoner while smarting under a *provocation so recent and so strong*, that the prisoner might be considered as not being at the moment *master of his own understanding*, the offence will be manslaughter.

"In a leading case in England, three Scotch soldiers were drinking together in a public house. Some strangers in another box abused the Scotch nation, and used several provoking expressions towards the soldiers, on which one of them, the prisoner, struck one of the strangers with a small rattan cane, not bigger than a man's little finger. The stranger went out for assistance, and in the meantime an altercation ensued between the prisoner and the deceased, who then came into the room, and who, on the prisoner's offering to go without paying his reckoning, laid hold of him by the collar, and threw him against a settle. The altercation increased, and when the soldier had paid the reckoning, the deceased again collared him and shoved him from the room into the passage. Upon this the soldier exclaimed that he did not mind killing an Englishman more than eating a mess of crowdy. The deceased, assisted by another person, then violently pushed the soldier out of the house, whereupon the latter immediately turned round, drew his sword, and stabbed the deceased to the heart. It was adjudged manslaughter." (*Wharton's Crim. Law*, 4th Rev. Ed., § 989.)

If one detect another in the act of adultery with his wife, and instantly kills him, the offence will be but manslaughter.

From all the authorities, it is clear that where death ensues from a sudden affray, there being no evidence of any antecedent grudge, although a deadly weapon be used, the law presumes the absence of malice or a "premeditated design to

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kill," and that the offence committed is no more than manslaughter. Upon this ground, the defendant is entitled to a new trial.

Nelson J. Waterbury (District Attorney), on behalf of the People, contended that the verdict was fully sustained by the the evidence.

By the Court, *INGRAHAM, J.* . The counsel for the prisoner moves for a new trial, on the ground that the verdict is against evidence, and that the facts proven only warranted a conviction for manslaughter. Upon the trial of the cause, the jury were fully instructed as to the distinction between murder and manslaughter, and they were also told in what cases the killing of the deceased could be justified or excused. To the charge no exceptions whatever were taken, and the jury was also charged as requested by the prisoner's counsel on all these points. There can be, therefore, no ground for asking a new trial for errors of law in the judge's charge. The only question, therefore, proper for me to consider upon this motion is, whether the facts as proven will sustain the verdict finding the prisoner guilty of murder. I feel very much at a loss to draw any distinction between this case and that of *Shorter* (2 *Comst.*, 193). In that case the parties engaged in a sudden affray in the street. No one interfered. After several blows, the deceased discovered that Shorter had a knife, and retreated. The prisoner followed him, and blows passed between them until he got to the middle of the road, when the deceased fell and died. There was no positive evidence of blows by the prisoner with the knife; but upon evidence that the prisoner carried a knife, and that the deceased had several wounds on his body, given by a knife, the prisoner was convicted of murder, and that conviction was sustained. In the present case, the evidence against Shay is of a more positive character, and if the case of Shorter was one justifying a charge of murder, there can be no doubt but that the facts in this case would warrant a similar verdict. The deceased and one Smith were quarreling

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and Shay interfered. He struck the deceased the first blow on the head; this blow was returned by the deceased, who then retreated, followed by Shay. Shay secretly opened his knife, which led the deceased again to strike at Shay, and again to retreat. There is evidence that the deceased at that time had nothing in his hand, and some evidence from Corbel that he had a knife. The latter evidence, both from the character and the appearance of the witness, I think the jury might have very properly refused to believe. The question of fact arising thereon was left to the jury. After this Shay struck at the deceased with a knife, and cut him in the face with it. The deceased continued to flee, and Shay was approaching the deceased when Kirby ran in between them. The prisoner struck at Kirby with the knife, who jumped out of the way, and the prisoner then followed the deceased. One of his brothers called out to him to take care, or he would be killed, and as the deceased looked around to see his danger, the prisoner struck the knife into his temple with such force as to render it so fast there that with three attempts to pull it out made by the prisoner, he was unable to do it, and he then fled, leaving the knife sticking in the head of the deceased. Under these facts the question was submitted to the jury, whether the prisoner, before striking the last blow, had formed the determination to take the life of the deceased? The facts, in my judgment, were fully sufficient to warrant said conclusion. He was the aggressor. He used a knife when the deceased had none; he opened the knife secretly. After the blow he gave had been returned, he pursued the deceased; he threatened and attempted to stab Kirby who interfered; he again pursued the deceased while running, and he struck such a blow as no one would have struck in such a place if he had not determined to take life. In Shorter's case, the Court of Appeals held, that under such a state of facts, the question whether the homicide was justifiable or not, could not arise, and there was no color even for submitting that question to the jury, and that where the proper instructions were given to the jury between murder and manslaughter, and the jury found the prisoner guilty of

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murder, the judgment should be affirmed. In *The People v. Clark* (3 *Seld.*, 894), which was a case similar to this in the interference between others who were engaged in a conflict, the court say, "If there be sufficient deliberation to form design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months. It is enough that the intention precedes the act, although that follows instantly." So also in *The People v. Sullivan* (3 *Seld.*, 896).

Motion for new trial denied.

SUPREME COURT. New York General Term, February, 1860. *Sutherland, Allen and Bonney*, Justices.

MORTIMER SHAY, plaintiff in error, v. THE PEOPLE, defendants in error.

Conviction of petit larceny does not render the person convicted incompetent to testify as a witness, within the provision 2 *R. S.*, 701.

An exception to an improper question is not available on error, where the answer of the witness was a denial of his ability to give the information sought by the question.

In an indictment for murder, it was charged "that the said M. S. a certain knife, which he, the said M. S., in his right hand then and there had and held, him, the said J. L., in and upon the forehead, then and there willfully and feloniously and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said J. L., then and there, *with the knife aforesaid*, in and upon the forehead of him, the said J. L., one mortal wound," &c., &c. It was held, on error, that the clerical omission of the word "with," before the words "a certain knife," did not vitiate the indictment, the offence being sufficiently charged in other clauses of the indictment.

THIS case came before the court on writ of error. By the return it appeared that on the second day of December, one thousand eight hundred and fifty-nine, an indictment for mur-

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der, in the following form, was found against the plaintiff in error, in the New York Oyer and Terminer :

City and County of New York, ss :

The Jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath, present :

That Mortimer Shay, late of the first ward of the city of New York, in the county of New York aforesaid, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at the ward, city and county aforesaid, with force and arms, in and upon one John Leary, in the peace of the People of the State then and there being, willfully and feloniously, and of his malice aforethought, did make an assault.

And that the said Mortimer Shay, a certain knife, which he, the said Mortimer Shay, in his right hand then and there had and held, him, the said John Leary, in and upon the forehead, then and there willfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said John Leary, then and there, with the knife aforesaid, in and upon the forehead of him, the said John Leary, one mortal wound, of the breadth of one inch, and of the depth of three inches, of which said mortal wound he, the said John Leary, at the ward, city and county aforesaid, from the said twenty-third day of November, in the year aforesaid, until the twenty-sixth day of November, in the same year aforesaid, did languish, and languishing did live, and on which said twenty-sixth day of November, in the year aforesaid, the said John Leary, at the ward, city and county aforesaid, of the said mortal wound, did die.

And so the jurors aforesaid, upon their oaths aforesaid, do say that he, the said Mortimer Shay, him, the said John Leary, in the manner and form, and by the means aforesaid, at the ward, city and county aforesaid, on the day and the year aforesaid, willfully and feloniously, and of his malice aforethought, did kill and murder, against the form of the statute in such

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case made and provided, and against the peace of the People of the State of New York, and their dignity.

NELSON J. WATERBURY,
District Attorney.

On the 16th day of January, 1860, the defendant was arraigned in said court on said indictment, and pleaded not guilty thereto. The issue so joined came up to be tried on the first day of February, 1860, before Mr. Justice *Ingraham*, and a jury was duly impaneled to try said issue. The prosecution called, beside other material witnesses, Stephen Leary, a brother of the deceased, who testified that he witnessed the occurrences which resulted in the death of the deceased. This witness, as also others, testified to the circumstances immediately connected with the homicide of the deceased. He testified that he (the witness) was then in his eighteenth year. On the cross-examination of the witness, he admitted that he had been previously convicted of burglary, in the Court of General Sessions of the Peace, in and for the city and county of New York, and that he had been sentenced to the House of Refuge. The witness further testified that he had not been sent to the House of Refuge at any other time. The counsel for the prisoner then procured from the clerk of said Court of General Sessions a copy of the record of the conviction of said Stephen Leary, of petit larceny, duly certified by the said clerk of the said Court of General Sessions, and introduced the same in evidence, which said certified copy of said record of conviction is in the words and figures following :

“At a Court of General Sessions of the Peace, holden in and for the city and county of New York, at the City Hall of the said city, on Tuesday, the 22d day of June, in the year of our Lord one thousand eight hundred and fifty-eight. Present, the Honorable George G. Barnard, Recorder of the city of New York, Justice of the Sessions. The People of the State of New York v. Stephen Leary. On conviction by confession of petit larceny, goods, &c., of Thomas E. Stuart. Whereupon it is ordered and adjudged by the court that the said Stephen

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Leary, for the misdemeanor aforesaid, whereof he is convicted, be sent to the House of Refuge, there to be dealt with according to law. A true extract from the minutes. Henry Vandervoort, Clerk. (Indorsed)—N. Y. General Sessions of the Peace.—The People of the State of New York *v.* Stephen Leary.—Copy of Sentence.—June 22d, 1858.—House of Refuge."

The District Attorney hereupon admitted that the said witness, Stephen Leary, was the person described in said certified copy of the record of the conviction. The counsel for the prisoner thereupon moved to strike out the evidence of said Stephen Leary. The court denied said motion, and refused to strike out the evidence of said Stephen Leary, to which the counsel for the prisoner then and there duly excepted. Testimony of other witnesses for the prosecution was given. Among the witnesses for the defence, one Thaddeus Spencer was called, who testified, among other things, that he saw the prisoner at about ten o'clock in the forenoon of the day when the homicide of the deceased occurred, and about three hours after the homicide occurred; that at this time the prisoner was cut behind the right ear, apparently by a knife or some sharp instrument, and the wound was bleeding freely. The witness further testified that he also saw at that time a cut upon the hat of the prisoner; it was claimed by the defence that this cut was made by the deceased, before the prisoner used a knife upon the deceased, and by the prosecution that the wound had been inflicted after the deceased had been stabbed by the prisoner (either by the brick thrown at him by Stephen Leary, or in the mode testified to by another witness). On cross-examination by the District Attorney, the following question was put to the witness:

Q. Do you know that the prisoner had a cutting match with any one previous to the killing of Leary?

To this question the counsel for the prisoner duly objected. The court overruled the objection, and allowed the question; to which the counsel for the prisoner then and there duly excepted.

The witness answered: I do not.

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Other testimony was given by the defence and prosecution, after which the case was summed up by the counsel for the defence and prosecution, respectively. The judge then charged the jury, who rendered a verdict of guilty. The prisoner was sentenced to be executed on the 20th day of April, 1860. Mr. Justice Ingraham granted a stay of proceedings in the following form, indorsed upon the writ of error:

I allow the within writ, and I do direct that the same is to operate as a stay of proceedings on the judgment upon which such writ is brought.

(Signed)

D. P. INGRAHAM, *Justice*.

Dated New York, February 25th, 1860.

Henry L. Clinton, for plaintiff in error.

I. The learned judge on the trial erred in refusing to strike out the testimony of Stephen Leary. To this ruling defendant excepted.

It appeared by the record of conviction introduced in evidence, that the witness had been convicted of petit larceny, and sentenced therefor to the House of Refuge.

Petit larceny is a felony at common law. (1 *Hale's Pl. Cr.*, 580; 1 *Hawk. P. C.*, 146.)

By the common law, a person convicted of petit larceny was not a competent witness. (1 *Phil. Ev.*, 80.)

In *Ward v. People* (3 *Hill*, 398), Nelson, Ch. J., on this subject observes: "It was doubtless intended by the Legislature to reduce the offence of petit larceny to the grade of a misdemeanor; but I am inclined to think they did not accomplish their object. The statute declares that 'Every person who shall be convicted of stealing &c., the personal property of another, of the value of twenty-five dollars or under, shall be adjudged guilty of petit larceny, and shall be punished by imprisonment in the county jail,' &c. (2 *R. S.*, 691, § 1.) The crime is felony at common law (2 *East. Cr. L.*, 736; 3d *Chitty's Cr. L.*, 924), and the only provision in the statute that can go to change the

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common law character of the offence, is that which declares the term 'felony,' when used in any statute, shall be construed to mean an offence for which the offender, on conviction, would be punishable by death, or by imprisonment in a State Prison. (2 R. S., 702, § 30.) This provision defines statute felonies, *but does not interfere with those existing at common law, untouched by the statute, of which the offence of petit larceny is one.*"

In the case of *Carpenter v. Nixon* (5 Hill, 260), the defendant's counsel, for the purpose of *impeaching the credit of a witness* (not for the purpose of having the testimony stricken out, as in the case at bar), who had been sworn and examined for the plaintiff, offered in evidence a record of the witness' conviction upon a charge of petit larceny. The plaintiff's counsel objected that the evidence was inadmissible, and the court sustained the objection. This ruling was held wrong, and a new trial was granted. The only point before the court was, whether it was competent to impeach the credit of a witness in this way. The court did not, and could not, decide anything beyond this. It could not decide that the witness was competent, for no objection to his competency was raised. The observations of the judge who delivered the opinion, on the subject of the competency of the witness, are entirely *obiter*.

The statute provides that "no person sentenced upon a conviction for felony, shall be competent to testify," &c. (3 R. S., 5th ed., 988, § 33.)

This was so before the statute. The same section provides that "no sentence, upon a conviction for any offence other than a felony, shall disqualify or render any person incompetent to be sworn," &c.

Although it is provided (*Ib.*, 989, § 40) that "the term 'felony,' when used in this act, or in any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a State Prison," yet it has been held that petit larceny, for which, on conviction, a party is not liable to be punished "by imprisonment in the State Prison," is a felony.

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It has also been held (*Keyser v. Hardbeck*, 3 Duer, 878), that notwithstanding the principle that if "A. buy goods of B., the latter having obtained them by a felony, no title passes; yet if one obtain goods by false pretences, and sell them to a *bona fide* purchaser, notwithstanding the seller is liable by law to be punished" * * * "by imprisonment in State Prison," the purchaser under such circumstances acquires a good title. Thus it would seem that the liability, upon conviction, to be sent to the State Prison, is not the test as to whether a particular crime be or be not a felony.

In *The People v. Adler* (3 Park. Cr. R., 249), it was held at general term that the common law rule that petit larceny is a felony, has not been changed by the Revised Statutes. The defendant, on the trial of an indictment for assault and battery, offered to prove that the complainant had been guilty of petit larceny, and that the alleged assault and battery consisted in arresting him therefor. It was conceded that if the complainant had been guilty of a felony, the defendant had a right to arrest him without warrant. The court below held that petit larceny was a misdemeanor, and therefore the defendant had no right to arrest the complainant without warrant, and accordingly excluded the proposed evidence. The Supreme Court held this ruling to be wrong, *on the ground that petit larceny was still a felony*, and on this ground granted a new trial. Here the point was expressly adjudged, that petit larceny is still a felony, as at common law.

II. The learned judge erred in allowing the District Attorney to put the question to the witness, Spencer, "Do you know that the prisoner had a cutting match with any one previous to the killing of Leary?"

The bearing of this question was to permit the prosecution to establish the violent character of the prisoner, by proving particular acts of violence.

Even were the prosecution allowed to prove bad character, it was not competent to do it in this way.

III. The indictment is fatally defective; it does not disclose a criminal offence within the rules of criminal pleading; it

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does not disclose facts sufficient to give the court below jurisdiction.

There is no allegation that Shay struck the blows which caused death. There is an averment that "a certain knife" * * * "did beat, strike, stab," &c., but it is nowhere alleged that Shay *directed or propelled the knife*.

On the subject of indictments, in *Chitty's Criminal Law*, 172, it is observed, in speaking of the greater strictness required in criminal than in civil pleadings, "for technical objections have been much more frequently admitted to prevail in criminal than in civil pleadings, and it was expressly laid down by Lord Mansfield, that a greater strictness is required in the former than is necessary in the latter."

"Time as well as place, ought in general not merely to be mentioned at the beginning of the indictment, but to be repeated to every issuable and triable fact," * * * "but after the time has been once named with certainty, it is afterwards sufficient to refer to it in the words *then and there*, which have the same effect as if the day and year were actually repeated." (1 *Chitty Cr. L.*, 219, 220.)

By bearing in mind this principle, for the purpose of properly dividing the averment, it will be perceived that the following analysis of the only count in the indictment is correct. The indictment charges:

- 1st. That Mortimer Shay made an assault upon John Leary.
- 2d. That Mortimer Shay held a certain knife in his right hand.
- 3d. That a certain knife "did beat, strike, stab," &c., said John Leary.

4th. That deceased received a mortal wound with the knife aforesaid.

5th. That of said mortal wound the deceased died.

(The above are the only issuable facts averred.)

6th. The formal conclusion that Mortimer Shay, "in the manner and form, and by the means aforesaid," * * * "did kill and murder," &c.

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The following is the language of the indictment setting forth the assault, which is the first averment:

"That Mortimer Shay, late of the first ward of the city of New York, in the county of New York aforesaid, on the twenty-third day of November, in the year of our Lord, one thousand eight hundred and fifty-nine, at the ward, city and county aforesaid, with force and arms, in and upon one John Leary, in the peace of the People of the State, then and there being, willfully and feloniously, and of his malice aforethought, did make an assault."

This is the first issuable fact.

The second issuable fact is: That Mortimer Shay held a knife in his right hand, which is set forth in the following language: "A certain knife which he, the said Mortimer Shay, in his right hand then and there had and held."

The third issuable fact set forth in the indictment, is that a certain knife did beat, strike, stab, &c., John Leary. This issuable fact is set forth in the following language: "And that the said Mortimer Shay, a certain knife which he, the said Mortimer Shay, in his right hand then and there had and held, him, the said John Leary, in and upon the forehead, then and there willfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut and wound."

This third issuable fact should have been, "that Mortimer Shay, *with* a certain knife, did beat, strike, stab," &c. The absence of the word *with* destroys the *gravamen* of this averment. This averment is the *gist—the essence—the soul of the whole indictment*. Unless it is here charged that Mortimer Shay, "cut, thrust," &c., that allegation is nowhere made; without supplying the word *with*, the language contained in this count cannot be forced to convey the idea that defendant inflicted the violence which caused death.

This averment contains a complete sentence, to wit, a nominative, a verb, and an objective case. This sentence, in order to determine what it means, should be construed by itself. It contains the allegations (and none other), in substance, that Mortimer Shay held a knife in his right hand, and that "a cer-

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tain knife" (not Mortimer Shay), "in and upon the forehead" of "John Leary," * * * "did beat, strike, stab," &c. This entire averment must be taken as it is, or be stricken out as surplusage. It cannot be stricken out as surplusage, for then there would certainly be no averment (even if my criticism of this language is all wrong) that Mortimer Shay struck the fatal blow; and if there be no such averment, then clearly it is nowhere charged that defendant caused the death. If the averment must stand as it is, then there is no charge against the defendant, except that he held the knife in his right hand. (And even this not well pleaded.)

In an indictment for homicide, it is necessary to set forth the means causing the death of the deceased. (1 *East's Pl. Cr.*, 341; 1 *Hawk.*, ch. 23, § 84; 13 *Price*, 172.)

In 1 *East's Pl. Cr.*, 341, it is said: "*It is essentially necessary to set forth particularly the manner of the death, and the means by which it was effected, and an omission in this respect is not aided by a general conclusion that the defendant so murdered,*" &c.

"An indictment of murder or manslaughter hath these certainties and requisites to be added to it more than other indictments, for it must not only be *felonice*, and ascertain the time of the act done, but must also, 1. Declare how, and *with what it was done*, namely, *cum quodam gladio*." (2 *Hale Pl. Cr.*, 185.)

According to *Wharton's Am. L. Homicide*, 260, where a knife is used in causing death, it is necessary to use in that part of the indictment now under discussion, the words "*with a certain knife*," "which he, the said A. B., in his right hand then and there had and held." (*Ib.*, 267.)

According to all the elementary authorities and books of precedents, the word "*with*," in this connection, is indispensable.

The following are among the cases where it has been held that the omission of a single word, not more important than the word "*with*," in this case, was fatal on motion in arrest of judgment.

In an indictment for passing counterfeit money, which charged that the defendant "*feloniously utter,*" dispose and

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pass, &c., omitting the word "did" before "utter," was held bad, and the court arrested the judgment on the ground of uncertainty, no charge being made that the prisoner did the act. (*State v. Holden*, 2 *McCord*, 377.)

In an indictment for subornation of perjury, the omission, even by mistake, of the verb implying that the witness charged to have been suborned, *testified*, is fatal on motion in arrest, and cannot be supplied or cured by *intendment*. (*State v. Leech, Jr.*, 27 *Vt.* [1 *Will.*], 317.)

An indictment against a thief and a receiver of stolen goods, jointly, which the first "feloniously did steal, take and carry" the goods, and that the second feloniously received the goods, knowing them "to have been feloniously stolen, taken and carried away as aforesaid," is insufficient, for want of adding "away" after "carry," to support a judgment against either defendant. (*Commonwealth v. Adams et al.*, 7 *Gray R.*, 48.)

The following are among the instances in which it has been held that the use of a wrong word, by mistake, in an indictment, was fatal:

An indictment for receiving alleged, by mistake, that the prosecutor, instead of the prisoner, knew that the goods were stolen.

The defect was not noticed till after verdict, when a motion was made in arrest of judgment, but the court below then amended the indictment.

Held, that the amendment could not be made after verdict, and that the indictment was bad in arrest of judgment. (*Reg. v. Larkin*, 6 *Cox's Cr. Cases*, 377.)

A count in an indictment for murder, charging that the prisoner did strike the deceased "on the left temple, giving him a mortal wound on the right temple," &c., is inconsistent and void. Judgment arrested. (*Dias v. State*, 7 *Blackf.*, 20.)

An indictment alleged that the prisoner "broke and entered the store of one Merrill, and certain goods from the shop aforesaid, then and there being, then and there in the shop aforesaid, feloniously did steal, take and carry away." It was held, that the words "store" and "shop" were not synonymous; that

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the word "shop," being *descriptive* of the place where the larceny was committed, could not be rejected as surplusage, and that the indictment was fatally defective. (*State v. Canney*, 19 N. H., 135.)

An indictment against one for willfully obstructing the engine of a railroad corporation, was held fatally defective, because it used the words "railroad company," instead of "railroad corporation." Judgment was arrested on this ground. (*State v. Mead*, 27 Vt. [1 Will.], 722.)

The following additional illustrations of the fatality of defective averments will show how strict are the rules of criminal pleading, with reference to indictments:

Where the defendant was found guilty of an attempt to commit a rape, and the indictment alleged the design was to be accomplished *violently* instead of by *force*. Judgment was arrested. (*State v. Blake*, 39 Maine R. [4 Heath], 322.)

An indictment charged that the defendant, on the 25th of March, 1841, committed the crime of adultery with E. W., the wife of L. H. W., she being a married woman, and the lawful wife of said L. H. W. *Held*, that the indictment did not sufficiently allege that she was a married woman, *when the alleged offence was committed*. (*State v. Thurston*, 35 Maine R. [5 Reddington], 205.)

Where it was averred that the offence was committed "on or about" a specified day, it was held that the words "on or about" were fatal to the averment, on the ground that it was a rule of criminal pleading that every *issuable fact* should be alleged to have occurred on a specific day. A motion to amend was denied, on the ground that the error was not one of form, but was a matter of substance. (*State v. Barker*, 34 Maine R. [4 Reddington], 52.)

Where a statute makes criminal the doing of the act "willfully and maliciously," it is not sufficient for the indictment to charge that it was done "feloniously and unlawfully," or "feloniously, unlawfully and willfully." These latter terms not being of the precise import of those used in the statute, it was held that this defect was fatal, on a motion to quash, or upon

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demurrer, or upon a motion to *arrest of judgment*. (*State v. Gove and wife*, 84 N. H. R. [5 Fogg.], 510.)

An indictment describing the things stolen, as "three dollars in divers pieces of silver, current in this State, and of the lawful value of three dollars," is bad on error. (*Lord v. State*, 20 N. H. R., 404.)

Judgment will be arrested if the indictment be so framed as to leave it doubtful which, of two or more acts charged, the party accused is legally required to defend. (*State v. Smith*, 20 N. H. R., 899.)

Where a defendant was indicted, and the charge was alleged in the words "taken upon himself to do" the act complained of, it was held that the indictment was fatally defective, as it did not contain, in the words "taken upon himself," a sufficient averment that the defendant committed the act or offence sought to be charged. (*State v. Perris*, 2 Bailey, 17.)

In delivering the opinion in this case, the court holds the following language: "There is no affirmative allegation that the defendant did the act charged, nor is it supplied by the averment that *he did take upon himself* to do it. One may take upon himself to do an act *in futuro*, or one which he may be actually unable to perform."

An indictment for murder, which states the death to be by striking and beating the deceased with a piece of brick, is not supported by proof that the prisoner knocked him down with his fist, and that the death was caused by the deceased striking his head, by falling on a piece of brick in consequence of the blow. (*Rex v. Kelly*, Cox C. L. [75 R. & M. C. C.], 118; *Rex v. Wrigley*, 1 Lew. C. C., 198; 1 Lew. C. C., 127.)

Where the death arises from any wounding, beating or bruising, it is said that the word "struck" is essential, and the wound or bruise must be alleged to have been *mortal*; nor is the latter word supplied by the allegation, which is at all times necessary, "that the deceased died in consequence of the violence inflicted upon him." (1 Chitty's Cr. L., 248.)

IV. The defect in the indictment is not cured by the formal conclusion, "and so the jurors aforesaid, upon their oath afore-

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said, do say that he, the said Mortimer Shay, him, the said John Leary, *in the manner and form, and by the means aforesaid,*" * * * "did kill and murder," &c.

Where, in an indictment, it is not positively averred that the prisoner did the act, such omission cannot be remedied by concluding with an averment of the *scienter*. It will be a fatal defect in the indictment. (*State v. Holden*, 2 McCord, 377.)

On this point Woodward, J., in *Lutz v. Commonwealth* (29 Penn. R., 445), observes: "The elementary writers all agree that a charge substantially defective is not to be helped out by this formal conclusion. And it must indeed be so, for in strictness of speech the reference '*and so,*' is to charge as laid, and if that does not amount to murder, these customary words cannot make murder of it."

V. The defect in question in the indictment is not cured by verdict.

The third averment in the indictment, that "a certain knife" * * * "cut, thrust, &c., John Leary," cannot be rejected as surplusage, nor can the word "*with*" be supplied by indictment. It is a part of the description of the offence.

"Defective description of the offence charged is not one of the points in which an indictment is cured by a verdict, but the same is equally fatal upon a motion in arrest of judgment, as upon demurrer or a motion to quash." (*State v. Gore*; *State v. Cars*, 34 N. H., 510.)

Here the words "feloniously, unlawfully and maliciously," were held not equivalent to "willfully and maliciously."

If all the facts alleged in an indictment may be true, and yet constitute no offence, the indictment is insufficient, and a verdict does nothing more than to verify the facts charged. (*State v. Godfrey*, 11 Shep., 232.)

"Where the defendants confess themselves guilty *in manner and form*, as charged against them in the indictment, if no offence against the law is charged, they have not confessed themselves guilty of any." (*Fletcher v. State*, 7 Eng., 169.)

VI. The defect in this indictment is not cured by the following section of the Revised Statutes:

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“§ 52. No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be affected.”

1. By reason of having omitted the addition of the defendant's title, occupation, estate or degree; or by reason of the misstatement of any such matter, or of the town or county of his residence, where the defendant shall not be misled, or prejudiced by such misstatement; or,

2. By the omission of the words “with force and arms,” or any words of similar import; or,

3. By reason of omitting to charge any offence to have been committed contrary to a statute, or contrary to several statutes, notwithstanding such offence may have been created, or the punishment thereof may have been declared, by any statute; or,

4. *By reason of any other defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant.* (2 R. S., 728, § 52.)

The omission complained of, as already shown, is material, and an omission of what is thus material *in point of law*, does tend to the prejudice of the defendant. The above statute does not cure a material omission.

The kind of defects which this statute remedies, will be best observed by referring to some of the cases decided under it.

Held, that the words “with intent to extort and gain from him, the said A., a large sum of money,” necessarily implied that it was A's property, and that the words “belonging to the said A.,” were unnecessary. (*Diggs v. The People*, 8 Barb., 547.)

When an indictment charged a party with forging a check on a bank, with intent to defraud, &c., setting forth the check in *hæc verba*, it was held not necessary to allege that the check was an instrument in writing. (*People v. Rynders*, 12 Wend., 427.)

Where the word “lottery” was used in an indictment, it was held that that word meant the same as the words “game” or “device,” and that it was unnecessary to use the latter words. (*People v. Warner*, 4 Barb., 814.)

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The principle running through the cases cited on the subject of this indictment, and all the adjudications, is that, if all that is charged, *according to the settled rules of criminal pleading*, may be true, and yet the prisoner be guilty of no offence, or, at all events, not guilty of the offence sought to be charged, the indictment is fatally defective, and the judgment should be arrested. All the authorities regard such defects not as matter of form, but as matter of *substance* which "tends to the prejudice of the defendant."

"The charge must contain a *certain* description of the crime of which the defendant is accused." (1 *Chitty's Cr. Law*, 169.)

VII. The learned judge at the Oyer and Terminer erred in denying the motion in arrest of judgment.

In his opinion he says, "the mistake is evidently a clerical one, but still *if material to charging the offence, would be available.*"

It clearly is material in charging the offence. The substance of the charge now sought to be made in the indictment, is that defendant *with a knife* stabbed John Leary, and in that way killed him, and therefore is guilty of murder. The third averment, charging that the "knife" * "did cut, thrust, stab," &c., is the only averment whose office should be to charge that defendant gave the blows which caused death. The giving of the blows *with "a certain knife,"* is the only criminal act that could be imputed to defendant, if the indictment were properly framed. With the exception of the first averment, that defendant made an assault which, in an indictment for murder, would be unimportant unless accompanied by a blow or battery, and with the exception of the second averment, that defendant held a knife in his right hand, all that is alleged is simply a matter of *inference, conclusion or deduction*, from the premises previously stated.

The fourth averment of the giving of a mortal wound, and the fifth averment that death was the result of that wound, are certainly but deductions from the previous averment, as much so as if the fourth and fifth averments had used the language, "in manner and form aforesaid."

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The learned judge says: "The indictment would read so as to charge the offence, if these were included in a parenthesis—That the said Mortimer Shay (he, the said Shay, then holding a knife in his hand), did stab, beat, strike and wound the said Leary, and giving unto the said Leary, then and there with the knife aforesaid, a mortal wound," &c.

It is a sufficient answer to say that such is not the language of the indictment. It must be held sufficient or insufficient as it is. No court has the power to leave out certain words and insert others, or to rearrange or transpose the language, in order to cover up its legal deformity. As was said by the Supreme Court in *State v. Leach* (27 Vt. R., §17), where a *single word*, as here, was left out in the indictment (after speaking of the omission of word), "though no doubt a mistake," the court say, "but can this omission be supplied or cured by intendment? We think not." "*No latitude of intention is allowed to include anything more than what is expressed.*"

Neither the whole of the third averment, nor any part of it, can be stricken out as surplusage.

In the case where it was asked to have stricken out as surplusage "or about," the indictment having averred that the offence was committed "on or about" a certain day, the court held that these words could not be stricken out as surplusage, inasmuch as so doing would alter entirely the legal effect of the averment in question. The court observe, "*if they were stricken out, the complaint would allege an exact day.*" (*State v. Barker*, 84 Maine, 52.)

It is said that "if, however, an averment may be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, it may be disregarded in evidence." (*State v. Copp*, 15 N. H., 212.)

If the whole of the third averment was stricken out as surplusage, for the purpose of making sense of the rest of the indictment, there would be no allegation that the defendant (or even the knife, which is the subject of the indictment), struck any blows, or did any act to cause the death of Leary. *If the averment remain as it is, it fails to charge any offence against*

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the defendant; if it be stricken out as surplusage, the whole indictment is gone.

The learned judge continues:

"The offence is fully stated without the word omitted." How? In what averment? Certainly not in the third averment, which alleges the blow, the only act which could be criminal on the part of the defendant. It is, however, but just to quote the whole of this part of the opinion: "The offence is fully stated without the word omitted; and although it is necessary to name the weapon with which the death was effected, the indictment sufficiently shows it, notwithstanding the omission of the word complained of. The cases cited by the prisoner's counsel are none of them applicable to this case. They relate to cases where the defect was in charging the offence; here it is merely in relation to the weapon with which the offence was committed, and in that respect the objection is remedied by the subsequent part of the count in the indictment, which charges expressly that the wound was given with the knife, and that of such wound the deceased died."

It is submitted:

1st. That there is no difference, either in law or common sense, between stating the offence and stating the means or weapon with which it was perpetrated. *The statement of an offence includes a statement of every fact legally essential to constitute that offence.* As well might it be said that the description of a paper forged, formed no part of the statement of the offence of forgery, or that the description of an article stolen, or that the asportation or carrying away of the thing stolen formed no part of the statement of the offence of larceny, as to say, that the description of the act of a party in cutting and stabbing *with* a knife, is not a part, and a most material part, of the description of the offence in an indictment for murder. This is the most material part of the offence; in short, it is emphatically *the offence itself*.

2d. The objection to the indictment is not that it does not appear that the knife caused the mortal wound, and that of such wound the deceased died. If the learned judge thought

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that, because it appeared that the knife caused the wound, and the wound resulted in death, the objection made to the principal averment in the indictment was obviated, he, through the fault of counsel probably, entirely misapprehended the nature of the objection. If he intended to hold that the subsequent averments charged that the prisoner struck the blows with a knife, then such a doctrine is diametrically opposed to the well settled rule of criminal pleadings, and the uniform current of adjudged cases.

Thus, in the indictment against the thief and receiver, jointly, which averred that the thief feloniously "did steal, take and carry" the goods, and that the second feloniously received the goods, knowing them "to have been feloniously stolen, taken and carried away as aforesaid," the omission of the word "away," was held fatal in arrest of judgment, not only with reference to the thief, but the receiver. It was held that, although the word *away* was supplied in the subsequent averment, which alleged that the receiver, "well knowing it to have been stolen, taken and carried away," yet, *inasmuch as this material word was left out in the averment which charged the stealing, that the judgment should be arrested with reference to the receiver as well as the thief.* (*Com. v. Adams*, 7 Gray R., 48.)

In the indictment for subornation of perjury (before cited), where it was held that the omission of the single word "testified," was fatal on motion in arrest, the averment in question was in the following language: "And the said Charles Lee, being so sworn as aforesaid, then and there, at the trial of said issue, upon his oath aforesaid, falsely, corruptly and willfully, before the said jurors so sworn and taken, between the parties as aforesaid, and before the said court, in substance and to the effect following, that is to say: I [meaning the said Charles Lee] saw and conversed with Francis Geryette, in," &c. (*State v. Leach*, 27 Vt, 817.)

Here it will be perceived that although it appeared unmistakably from the whole averment what was intended to be charged, to wit, that the defendant testified thus and so, and although the testimony given on the proceeding in question,

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was set out in detail in the subsequent part of the count, yet the court held that the word being material, it could not be supplied by intendment, nor could the difficulty be obviated by any of the subsequent averments, no matter how palpable might be the intention of the pleader.

In the case of *State v. Holden* (2 McCord, 377), before cited, where, on an indictment for passing counterfeit money, which averred that the defendant "feloniously utter, dispose and pass," omitting the word "did" before "utter," &c., it was contended that a subsequent averment cured the omission of the word "did." The court, however, held otherwise. In delivering their opinion, the court say: "Look into the indictment, and let it be asked with what criminal act does it charge the prisoner? It is answered in the argument, that by looking into the whole context, and taking into view the concluding averment, '*that at the time of the uttering, &c., the prisoner well knew,*' &c., what was intended, sufficiently appears to answer all the purposes for which certainty is required. *The averment refers to the preceding, and you must look to that to determine its meaning.*" [So in the case of Shay. If the third averment setting forth the fatal blows given to deceased, fails to allege that Shay gave those blows *with* "a certain knife"—and there is no pretence that he gave them in any other way—the expression in the subsequent part of the count, "giving unto the said John Leary, then and there, with the knife aforesaid," * * "one mortal wound," does not cure the difficulty, because, in the language of the court cited, "*this averment refers to the preceding, and you must look to that to determine its meaning.*"'] The court in their opinion continue as follows: "Nothing ought, therefore, to be left to conjecture. It might be conjectured that the prisoner was present when another did the act," * * * "*and fancy might conjecture a thousand other things equally appropriate and innocent in themselves.*" The court hold that the omission "is not supplied by the concluding averment in the indictment, and is fatal. The motion (in arrest of judgment) is granted."

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In all these cases, and in the authorities uniformly, it is held that a defective averment cannot be cured by a subsequent averment, where the foundation of the latter rests upon the former, and this no matter how apparent may be the meaning of the pleader, shutting out of view the rules of criminal pleading.

In the case of *State v. Thurston* (34 Maine, 205), before cited, the court say: "Although we can readily suppose what was intended by the averments, yet in criminal pleading nothing can be taken by intendment."

"No latitude of intention is allowed to include anything more than what is expressed." Per Bennett, J., in delivering opinion of Supreme Court, in *State v. Leach* (27 Vt., 817), before cited.

The charge must be sufficiently explicit to support itself, for no latitude of intention can be allowed to include anything more than is expressed. (1 *Chitty's Cr. Law*, 172.)

"A general averment that the accused had committed a particular crime named, without more specific allegations, would be insufficient." (Per Howard, J., *State v. Thurston*, 35 Maine, 205.)

If an averment, descriptive merely, as for example, of the place of the offence, is material and fatal to the indictment, because in one part of it the word "shop," instead of "store," is used, then, certainly an averment describing the offence, or rather the prisoner's alleged participation in it, to wit, striking deadly blows *with* "a certain knife," is material, and the omission of the word *with*, in the most material part of the most material averment in the indictment, is fatal on motion in arrest of judgment.

It is clear that the indictment is fatally defective, and judgment should be arrested.

Nelson J. Waterbury (District Attorney), for the defendants in error.

I. The only offence of which this witness was claimed to have been convicted, was that of petit larceny, for which he

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was sentenced to the House of Refuge. This being a first offence, was not a felony, and the sentence thereupon did not disqualify him as a witness. (*Carpenter v. Nixon*, 5 *Hill*, 280.)

1. The point whether or not petit larceny is yet a felony at common law, discussed in *Ward v. People* (3 *Hill*, 398), has no bearing upon this question, as is expressly ruled in *Carpenter v. Nixon*, above cited. Nor does the subsequent case of *The People v. Adler* (3 *Park. Cr. R.*, 254), controvert that ruling.

2. The statute (2 *R. S.*, 701, § 23, *orig. ed.*), bases the incompetency of a witness only upon a sentence upon a "conviction for felony," and further declares that "no sentence upon a conviction for any offence other than a felony shall disqualify;" and the same act (§ 30), declares that "the term felony, when used in this act or in any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a State Prison." In no case can a person, convicted for the first time of petit larceny, be now sentenced to a State Prison.

II. The question was properly allowed. The defence sought to show by the witness that he discovered on the morning of the homicide that the prisoner's hat was cut, for the purpose of an inference that the cut had just been made by a weapon in the hand of the deceased; and it was clearly proper to show that the prisoner and a third person had fought with knives a few days previous, when the cut might have been made. The inference in one case would have been as warrantable as in the other.

III. On a cross-examination, the question was undoubtedly proper. The point as to the cut was material to the issue, and the question might be a foundation for impeaching the witness, to be followed by further questions, and then by showing that he had made a contradictory statement to another person.

IV. If the question was improper, the difficulty was cured by the answer. It elicited no testimony, and the rule is well settled that an exception will not be available to an improper question, when it does no harm.

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V. The indictment clearly describes the offence, to wit, that of murder; and everything necessary to constitute it is positively stated. In no way can the indictment be read, so as to fail to describe the offence, and every essential thereto, or so as to leave any doubt in respect to either.

1. This is rendered more clear by omitting the clause concerning the knife, which it is claimed that the word "with" should precede; in which case the indictment would read, "and that the said M. S., him, the said J. L., in and upon the forehead, then and there willfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said J. L., then and there, with the knife aforesaid, in and upon the forehead of him, the said J. L., one mortal wound," &c. So read, it will be seen that the only use or effect of the omitted words, "a certain knife which he, the said M. S., in his right hand then and there had and held," is to describe the knife, and the manner of holding it, and this may be considered as done by way of parenthesis.

VI. If the indictment sufficiently describes the offence, any deficiency in style or grammar, or any clerical error, is merely formal and is cured, especially after verdict, by the statute of jeofails. (2 R. S., 728, § 52, *sub. 4, orig. ed.*)

By the Court, SUTHERLAND, P. J. At the last Oyer and Terminer, held in this city, the prisoner, Mortimer Shay, was tried on an indictment for the alleged murder of one John Leary, and was convicted.

The case comes before this court by writ of error.

On the trial, among other witnesses, one Stephen Leary was called and sworn as a witness on the part of the People, and the testimony which he gave was material to the issue.

It appearing that Stephen Leary had previously been convicted of petit larceny at a Court of General Sessions of the Peace, held in and for the city and county of New York, by a copy of the record of his conviction, properly certified and introduced in evidence by the counsel for the prisoner, the

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counsel for the prisoner thereupon moved that the evidence of the said Stephen Leary be stricken out.

The court denied such motion, and refused to strike out such evidence; and the counsel for the prisoner then and there duly excepted to such refusal of the judge to strike out Stephen Leary's testimony.

The first question presented by the writ of error, is, did the judge err in refusing to strike out this testimony? or, in other words, was Stephen Leary a competent witness, notwithstanding his previous conviction of petit larceny?

The three chapters constituting the fourth part of the Revised Statutes, were passed as one act. That act is entitled "An act concerning crimes and punishments," &c.

By section one of title six of chapter one of that act (2 R. S., 690), petit larceny is defined to be the "stealing, taking or carrying away the personal property of another, of the value of twenty-five dollars or under;" and that section declares that the punishment of petit larceny shall be "imprisonment in a county jail not exceeding six months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment."

Section twenty-three of title seven of the same chapter (2 R. S., 701), declares that "no person sentenced upon a conviction for felony, shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless pardoned," &c.; but that "no sentence, upon a conviction for any offence other than a felony, shall disqualify or render any person incompetent to be sworn or to testify in any cause, matter or proceeding, civil or criminal."

Section thirty of the same title, seven (2 R. S., 702), declares that "the term felony, when *used in this act*, or in any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a State Prison."

It would appear to follow so clearly and conclusively from these statutory provisions and definitions, that Stephen Leary was a competent witness in this case, notwithstanding his previous conviction of petit larceny, and that the judge did right

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in refusing to strike out his evidence; that it is difficult to see how even a question could be raised on that point. One provision of the act is, that no conviction for any offence other than a *felony*, shall disqualify or render any person incompetent to be sworn or to testify; and another provision of the same act defines the word "*felony*," *when used in the act*, to be an offence punishable by death or imprisonment in a State Prison; and by a third provision of the same act, the offence of petit larceny is defined; and it is declared to be punishable, not by death or imprisonment in a State Prison, but by fine or imprisonment in a county jail, or by both such fine and imprisonment.

It follows so plainly from these statutory provisions that Stephen Leary was a competent witness, notwithstanding his previous conviction of petit larceny, that one would hardly look for, or expect to find, an authority outside the statute on that point.

The case of *The People v. Adler* (8 Park. Cr. R., 249), does not at all interfere with this plain construction of the statute. That case decides only that the definition of the word felony, in the Revised Statutes, applies only where the word is used in a statute, leaving petit larceny still a felony as at common law, "in respect to all questions controlled solely by the common law." The question in *The People v. Adler* was such a question, unaffected by the statutory definition.

On the cross-examination, by the District Attorney, of Thaddeus Spencer, a witness called and sworn for the prisoner, the District Attorney put this question to the witness: Do you know that the prisoner had a cutting match with any one previous to the killing of Leary?

The witness was allowed to answer this question, after objection by the counsel for the prisoner. The answer was: I do not.

As the answer could not possibly prejudice the prisoner, it is unnecessary to inquire whether the question in reference to the testimony which had been given by the witness on his direct examination, was or was not proper.

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The remaining question in this case is raised on the face of the indictment. That question is, whether the indictment, in charging the offence, sets forth with sufficient particularity and certainty the manner of the death, and the means by which it was effected? The counsel for the prisoner insists that the indictment is fatally defective in this respect, and does not charge the crime of murder within the rules of criminal pleading, and therefore moves that the judgment be arrested.

The indictment, after alleging in the usual manner that the prisoner, on a certain day, at the first ward in the city of New York, with force, &c., on and upon John Leary, willfully, feloniously, &c., did make an assault, and then proceeds as follows:

"And that the said Mortimer Shay, a certain knife, which he, the said Mortimer Shay, in his right hand then and there had and held, him, the said John Leary, in and upon the forehead, then and there willfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said John Leary, then and there, *with the knife aforesaid*, in and upon the forehead of him, the said John Leary, one mortal wound, of the breadth of one inch, and of the depth of three inches, of which mortal wound, he, the said John Leary," &c.

The counsel for the prisoner insists that the evidently clerical mistake in the omission of the word *with*, before the description of the weapon, renders the indictment fatally defective; that although the indictment alleges that the fatal wound was given with the knife, yet that in consequence of the omission of the word *with* before the word *knife*, in the preceding portion of the indictment, it is not alleged that the fatal blow or stab, &c., which caused the mortal wound, was given with the knife; that it does not appear, nor is it alleged, that the knife caused the mortal wound.

Now, without examining the authorities cited by the counsel for the prisoner, to show the particularity required in an indictment for murder, in setting forth the manner of the death and the means by which it was effected, and conceding for the purposes of this question, that the indictment in this case

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should have substantially alleged that the mortal blow or stab was struck or made with the knife, yet I think this indictment does in fact so substantially allege. The indictment distinctly and certainly alleges three things: 1st. That the prisoner then and there had and held in his right hand a certain knife. 2d. That he did then and there beat, strike, stab, cut and wound the deceased. 3d. That he then and there gave unto the deceased, on and upon his forehead, with the knife aforesaid, one mortal wound, &c.

Now is not this substantially alleging that the blow, stab, &c., were given *with* the knife?

It is certainly plainly alleged that the prisoner struck the deceased, having in his right hand a knife, and that he gave the mortal wound with the knife. Is not this substantially alleging that the prisoner struck the deceased with the knife, and that the knife caused the mortal wound? I think it is, and that the death, and the means, and the manner in and by which it was effected by the prisoner, are sufficiently and certainly charged in the indictment.

In my opinion the judgment of the Oyer and Terminer should be affirmed.

Judgment affirmed.(a)

(a) The following opinion was given by Judge Ingraham, on a motion in arrest of judgment in this case, made on the ground of the clerical omission in the indictment:

INGRAHAM, J. In this case the prisoner has been tried and convicted of murder. No objection was taken on the trial, or previous thereto, to the form of the indictment. A motion is now made on behalf of the prisoner in arrest of judgment for the omission of the word "with" in the indictment, before the description of the weapon used by the prisoner. The mistake is evidently a clerical one; but still, if material to charging the offence, would be available. The clause in the indictment reads as follows: "That the said Mortimer Shay, — a certain knife which he, the said Mortimer Shay, in his right hand then and there had and held, him, the said John Leary, in and upon the forehead, then and there willfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said John Leary, then and there, with the knife

SUPREME COURT. New York General Term, March, 1858. *Davis*,
Clerke and *Sutherland*, Justices.

JAMES BREEN *v.* THE PEOPLE.

Where a criminal charge rests upon circumstantial evidence, and where, upon any hypothesis, however improbable, consistent with the circumstances proved, the accused may be innocent, it is erroneous for the court to charge the jury that "it is incumbent on them to convict." The question of guilt in such cases, is for the jury and not for the court.

On a trial for crime, a quarrel between the complainant and the party against whom he testifies, though disconnected with the subject matter of the complaint, may be taken into consideration by the jury in ascertaining the motive and weighing the credibility of the witness.

THE prisoner was indicted for having stolen from Alexander R. Thorpe, the complainant, two promissory notes, known as bank bills, for the payment of and of the value of five dollars each, one promissory note, known as a bank bill, for the payment of and of the value of three dollars, and two promis-

aforesaid, in and upon the forehead of the said John Leary, one mortal wound," &c. I cannot conclude that the omission of the word "with," before the words "a certain knife," is such a defect in substance as to warrant granting this motion. The indictment would read so as to charge the offence, if those words were included in a parenthesis—"That the said Mortimer Shay (he the said Shay then holding a knife in his hand), did stab, beat, strike and wound the said Leary, and giving unto the said Leary, then and there with the knife aforesaid, a mortal wound," &c. The offence is fully stated without the word omitted; and although it is necessary to name the weapon with which the death was effected, the indictment sufficiently shows it, notwithstanding the omission of the word complained of. The cases cited by the prisoner's counsel are none of them applicable to this case. They relate to cases where the defect was in charging the offence; here it is merely in relation to the weapon with which the offence was committed, and in that respect the objection is remedied by the subsequent part of the count in the indictment, which charges expressly that the wound was given with the knife, and that of such wound the deceased died. It seems to me that the offence is fully charged in the indictment, notwithstanding the omission of this word, and if so, it becomes a mere error in matters of form, which is cured by the statute.

Motion denied.

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sory notes of the kind known as bank bills, for the payment of and of the value of one dollar each.

He pleaded not guilty, and was tried, before the Recorder, in the Court of General Sessions of the city of New York, in January, 1858.

It appeared on the trial that the prisoner was a bar-tender for Thorpe, and had been in his employ, in that capacity, from February until the 8th December, 1857, when Thorpe violently assaulted the prisoner, and inflicted upon him severe bodily injuries, for which the prisoner made a criminal complaint against Thorpe, and had him arrested. Two days after Thorpe had him so arrested, he preferred a complaint against the prisoner for petit larceny, upon which charge the indictment in this case was subsequently found. The assault and battery upon Breen was not connected with the accusation of larceny, but was prompted by a supposed grievance of a different character.

Thorpe testified: That on the 18th of November, 1857, he marked a \$3 bill on the Atlantic Bank of Brooklyn, N. Y., and a \$2 bill of the Bank of New York, and placed them in the till, and that on the 19th of November, 1857, he also marked and put in the till a \$5 bill on the Leather Manufacturers' Bank. That on the night of the 20th of November, 1857, these bills were brought into his room by Alexander R. Spencer, who handed them to him, and informed him that he had found them in Breen's pocket. That he, Thorpe, did not look at the bills or identify them that night, as he was then going to bed, but that he identified them next morning as the same bills he had marked and put in the till. That Spencer lived with him, and was the fellow bar-keeper of Breen, and that Breen had no authority to make up the cash except when he, Thorpe, was sick, or Spencer was away. It appeared however, on the cross-examination of Thorpe, that Breen was in the practice of paying out small amounts for incidental expenses, as for lemons and milk and ice, in sums of from \$3 to \$5. Thorpe owed Breen for wages from \$60 to \$80.

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Spencer testified: That he found the bills in question in the coat pocket of Breen, about one o'clock at night, on the 20th November, 1857; that they were done up in small wads; that his coat was at the head of the bed; that he did not know there were any marks on the bills; could not see any; that he gave the note to Thorpe.

Breen was not arrested on the charge of larceny till the 8th day of December, 1858.

Testimony was introduced to show the good character of the prisoner.

After the summing up of the counsel, the court, among other things, charged the jury, as matter of law, that Thorpe and Spencer testified to a state of facts, which, if true, established a larceny of the prisoner, and rendered it incumbent upon the jury to convict him, to which the prisoner's counsel excepted.

The court also charged the jury that the assault and battery committed on the defendant by the complainant, Thorpe, as testified to by the latter, had nothing whatever to do with the case of the defendant, it having occurred subsequent to the larceny (if one was committed), and that the jury should dismiss it from their consideration altogether, to which the prisoner's counsel also excepted.

The prisoner having been convicted, the case was removed to this court by writ of error.

Henry L. Clinton, for the plaintiff in error.

I. The court below erred in charging the jury "that the first two witnesses, Thorpe and Spencer, testified to a state of facts which, if true, established a larceny of the prisoner, and rendered it incumbent upon the jury to convict him."

The rule of law on this subject is correctly laid down in *Greenleaf's Evidence* (3 vol., § 29), as follows: "It is therefore a rule of criminal law that *the guilt of the accused must be fully proved*. Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion

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of all reasonable doubt." * * * "It is elsewhere said that the persuasion of guilt ought to amount to a moral certainty, or 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, *beyond all reasonable doubt.*' And this degree of conviction ought to be produced when the facts proved coincide with, and are legally sufficient to establish the truth of the hypothesis assumed, namely, the guilt of the party accused, and are inconsistent with any other hypothesis. For it is not enough that the *evidence goes to show his guilt*; it must be inconsistent with the reasonable suppositions of his innocence."

The error of the learned Recorder, in charging that the facts testified to by the witnesses Thorpe and Spencer, if true, established the guilt of the prisoner, is very apparent. Whether the circumstances, *if true*, established guilt; or whether they were as consistent (if not more so) with innocence as with guilt, *was purely a question of fact for the jury.*

Even the proof of the identification of the \$3 and \$5 bills, marked by Thorpe and put in his till, and alleged to have been found in defendant's possession, is by no means clear and satisfactory; but assuming, for argument's sake, that the identification is sufficiently proven, it by no means follows that the defendant did not come honestly in possession of the bills; on the night of the 20th of November, he is found in possession of the two bills, one of which was marked and put in the drawer on the preceding day, and the other two days before.

1st. He (defendant) might have paid out these bills, either in paying the incidental expenses of the bar, or in making change for customers, and received them back in the way of change in his individual transaction; as, for example, in defraying his expenses.

2d. He might have changed a bill of his own of larger denomination; for example, a \$10 bill, by putting such bill in the till, and taking out for his own use the \$5 and \$3 bills in question, and another \$2 bill.

It must be remembered that the defendant had the lawful custody of the money in the till. His position as bar-tender

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required him to receive money and pay it out constantly. His being in possession of money marked and put in the till by his employer, did not raise a presumption of larceny.

II. The court below erred in charging the jury "that the assault and battery inflicted on the defendant by the complainant, Thorpe, as testified to by the latter, had nothing whatever to do with the case of the defendant, having occurred subsequent to the larceny (if one had been committed), and that the jury should dismiss it from their consideration altogether."

The *motive* actuating a complainant in making a criminal charge against a party with whom he has had a difficulty, and with whom he is on ill terms, is always a proper subject of consideration for the jury in weighing the testimony of such complainant. The authorities are uniform on this point. (*Titus v. Ash*, 4 *Foster* [N. H.] R., 319; *Fulson v. Brown*, 5 *Foster* [N. H.] R., 195; *Atwood v. Welton*, 7 *Conn.*, 66; 1 *Greenl. Ev.*, § 450; *Rex v. Wewen*, cited 2 *Camp.*, 638; 1 *Stark. Ev.*, 155; *People v. Murray*, 1 *Wheeler Cases*, 662; *Swift's Ev.*, 148; *Roscoe's Cr. Ev.*, 181, 184; *Rob v. Hackley*, 23 *Wend.*, 50; *People v. Vane*, 12 *Wend.*, 78.)

In *Titus v. Ash* (4 *Foster* [N. H.] R., 319, 331, 332), the court, per Perley, J., hold the following language: "A quarrel between a witness and the party against whom he testifies, may be proved to discredit the witness." * * * "The court will not inquire which side was in the wrong. But the degree of violence in the quarrel is manifestly *material* to the point in question. Was it a slight and accidental difference on some trifling subject, such as would be likely to leave behind no trace of ill-will or prejudice? or a serious and inveterate feud, *such as would perpetuate a grudge in the mind of the witness against the party*? If the witness admits a misunderstanding, but denies the circumstances which shows that it was serious, he denies the substantial fact attempted to be proved. If he wholly denies the quarrel, *he may be contradicted*; and if he denies all that makes the quarrel material, we think he may be contradicted on the same principle. (*Harris v. Tippet*, 2

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Camp., 688; *Atwood v. Welton*, 7 *Conn.*, 66; *Pierce v. Gibson*, 9 *Vt.*, 216; *Rixey v. Bags*, 4 *Leigh R.*, 333.)

In *Martin v. Farnum* (5 *Foster [N. H.] R.*, 199), the court, per Bell, J., observes: "It is always a material question, what is the state of feeling of a witness towards one or both of the parties; it is always proper, upon a cross-examination, if there is supposed to be any occasion for it, to inquire whether the relations of a witness are those of a defendant or friend to one of the parties, or whether he has any bias or prejudice, or hostility, which might affect his testimony, or induce a jury to distrust his statements, or weigh them with care. The statements in answer to such inquiries by the witness, are always regarded as material, and may be contradicted directly."

In *Atwood v. Welton* (7 *Conn.*, 71), the court, per Dagget, J., say: "The question whether the defendant had a controversy with the witness," &c., "surely was relevant to the issue; for it tended to prove such a state of mind towards the defendant, as might well be submitted to the jury, to discredit his testimony as to material facts. There is hardly a point about which there can be less doubt." (*Swift's Ev.*, 148; 16 *Mass.*, 185; 17 *Mass.*, 160; 2 *Camp. R.*, 530; 1 *Starkie's Ev.*, 135.)

In *Pierce v. Gibson* (9 *Vt. R.*, 222), the court, per Williams, Ch. J., say: "A party has a right to have the jury know if there is any hostility or bad feeling existing between the witness and himself at the time of his testifying. For that purpose it may be shown that a law-suit has existed; that a violent altercation has taken place, arising to personal violence."

These authorities show beyond all question that the personal difficulty between defendant and the complainant, "*arising to personal violence*," was a *material* subject for the consideration of the jury, and it was gross error in the court below to charge that it "had nothing whatever to do with the case of the defendant," * * * "and that the jury should dismiss it from their consideration altogether."

The court below properly admitted the evidence, and having admitted it, it should have been left to the jury to attach to

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it such importance as they deemed proper in weighing the evidence of the complainant. The court erred in its charge as to both points, to which defendant's counsel excepted, and a new trial should be granted.

John Sedgwick (Assistant District Attorney), for the defendants in error.

Per curiam. There was error in both portions of the charge.

Judgment reversed, and a new trial ordered.

NEW YORK GENERAL SESSIONS. September Term, 1859. Before
Abraham D. Russell, City Judge.

THE PEOPLE v. DENNIS CAMPBELL.

The court cannot acquire jurisdiction to try an offence by consent, nor can the averments in an indictment be changed by consent, so as to embrace any other than those presented by the grand jury.

Where, on demurrer to an indictment for larceny in stealing a dog it was stipulated that the indictment should be considered as alleging that the dog in question had been reclaimed and made tame and domestic, and that the defendant, knowing it to be such, feloniously took and carried it away: *held*, that the stipulation should be disregarded in deciding the demurrer.

A dog, though property, so as to enable the owner to maintain an action of trespass for an unlawful taking, was not the subject of larceny at the common law; but under the provisions of the statute declaring all personal property the subject of larceny, an indictment for stealing a dog will now be sustained in this State.

THIS was an indictment for grand larceny alleged to have been committed in stealing a dog. The defendant demurred. A stipulation between the parties, the substance of which is set forth in the opinion of the court, was submitted with the pleadings on the argument.

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The following opinion was given by

RUSSELL, J. The defendant was indicted at the last March term of this court, for grand larceny, in stealing (as averred) one dog of the value of \$50, and one collar, of the value of \$1, the property of Jeronomus S. Underhill. A demurrer to the indictment was argued before me at the last July term, on the ground that the stealing of a dog was not an offence by the laws of this State. Accompanying the indictment was a stipulation that it be considered as alleging that the dog in question was reclaimed, and made tame and domestic; and that the defendant, knowing it to be such, feloniously took and carried it away; and further, that the averment in the indictment as to the theft of the collar be deemed to have been omitted. The object was to present the question as though the indictment had been framed upon the simple felonious taking of the dog. It is impossible for the court to consider this stipulation in deciding the question as to whether a dog is property so as to be the subject of larceny. If it should be determined that a dog is not the subject of such an offence, the indictment would stand for the collar, which would make it in effect an indictment for petit larceny. If it should be so determined, and the prosecution cannot support the charge of stealing the collar, then, of course, the District Attorney would *not* *pros.* the indictment. No stipulation of this character can affect the structure of the indictment as it emanated from the grand jury. The charge, as made, being a felony, the Constitution of this State requires the presentment or indictment of a grand jury as a pre-requisite to trial; and if the pleading they file with the court could be remodeled by stipulations between the counsel, the defendant would not be tried upon the presentment of the grand jury, but rather upon the consent of the counsel.

This court cannot acquire jurisdiction to try an offence by consent, nor can its jurisdiction over an offence be changed by consent so as to embrace any other than that presented by the grand jury, where the action of that body is requisite. If the form of an indictment does not suit a prosecuting officer, his

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only remedy is by reindicting. On the trial of an indictment, certain omissions can be disregarded by the court (2 R. S., 728, 352); but unless the power is conferred by statute, or is warranted by the acknowledged rules of pleading, the court is not vested with it. The right does not extend to adding to or expunging from the indictment substantial allegations. In the case of *Cuncevi v. The People* (18 N. Y. R., 128), in which it was held that a prisoner could not consent to be tried by less than the constituted number (twelve) of jurors, Strong, J., who delivered the judgment of the Court of Appeals, uses this language: "There is obviously a wide and important distinction between civil suits and criminal prosecutions as to the legal right of a defendant to waive a strict, substantial adherence to the established constitutional statutory and common law mode and rules of judicial proceedings." The present indictment is a constitutional mode of proceeding, within the principle of this remark, and the defendant can waive no legal right by any consent he may give in reference to its important averments.

I have concluded to pass upon the question presented, and which was argued with ability on both sides, for the purpose of fixing the character of the indictment as to being one for grand or petit larceny.

At the common law, larceny could be committed of domestic cattle, *i. e.*, sheep, oxen, horses, &c., or of domestic fowls, *i. e.*, hens, ducks, geese, &c., because, according to Lord Hale, they were "under propriety," and served for food. So, as to beasts or birds, *feræ naturæ*, which were reclaimed and made tame or domestic, and served for food; *i. e.*, deers, pheasants, partridges, &c., if the thief knew them to be tame. It could not be committed as to some things whereof the owner might have a lawful property, and "such whereupon he might maintain an action of trespass"—*i. e.*, mastiffs, spaniels, greyhounds, bloodhounds, by reason, as Lord Hale says, of the baseness of their nature; nor of some things wild by nature, yet reclaimed by art or industry—*i. e.*, bears, foxes, ferrets, &c., because they served not for food, but pleasure. (1 *Hale's P. C.*, 510, 511.)

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The same rules are stated in substance in 2 *East. P. C.*, 607, 614, except as to dogs, because when this author wrote, the statute 10 *Geo. III.*, c. 18, was in force, making the stealing of dogs punishable upon a conviction before two justices. Blackstone repeats the same rules (4 *Bl. Com.*, 235, 236), and says that "dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a sort of base property therein, and maintain a civil action for the loss of them, are not of such estimation as that the crime of stealing them amounts to larceny." If this author means to say that a civil action could be maintained for the value of dogs, if wrongfully taken, it is difficult to see why they were not within the protection of the criminal law at the time he wrote. It will be observed, too, that instead of using the term baseness in connection with the nature of dogs, he uses it to stamp the kind of property which can be possessed or enjoyed in them.

As such parts of the common law as formed the law of the Colony of New York on the 19th day of April, 1775, have been retained by the Constitution of this State, subject to the power of the Legislature to alter them (*Const.*, art. 1, § 17), and as dogs were not the subject of larceny at the common law at that time, it is proper to consider whether the Legislature has altered the common law in this particular. At common law the only description of property which could be the subject of larceny, was "mere movables having an intrinsic value." Things savoring of the realty and written instruments were added by statutes. (*The People v. Loomis*, 4 *Denio*, 380.) The statutes of this State have extended the law of larceny further than the English statutes did. (*Ib.*) By the 2 *R. S.*, 679, section 363, it is provided that "any person who shall be convicted of the felonious taking and carrying away the personal property of another, of the value of more than twenty-five dollars, shall be adjudged guilty of grand larceny," &c. "Personal property," as here used, is defined by a subsequent section (2 *R. S.*, 702, § 33), "to mean goods, chattels, effects, evidences of rights in action and all written instruments," &c.

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Sections 64 and 65, increase the offence if committed in a dwelling house, or in a ship or other vessel, or if committed by stealing in the night-time from the person of another. Section 68 relates to the offence of severing produce from the soil of another, or property from the building of another, to the value of more than twenty-five dollars—which was not larceny at the common law. Sections 66 and 67 were intended rather to be rules of evidence than to serve to create or designate any distinct offences. They relate to written instruments—i. e., bonds, covenants, notes, bills of exchange, drafts, orders, receipts, lottery tickets, &c., and provide for ascertaining the value of such securities, or declare what shall be their value, if stolen, considered as the subjects of larceny. They commence thus: "If the property stolen consist of any," &c., showing that the particular property referred to is "personal property," within section 63. Section 69 relates to the stealing of the records, &c., of courts of justice. Since the Revised Statutes went into operation, the Legislature have made the offence of stealing railroad passenger tickets, before the sale thereof, or before being issued to the agents of the companies for sale, the subject of larceny. (3 R. S., 5th ed., 959, 960, §§ 75, 76, 77.) This is a new crime, and would not have been the subject of larceny under *The People v. Loomis*, cited above. As the law stood, these tickets would have had no value until they had been issued by their respective companies.

As I understand section 63 of the statute, it is meant to define the offence of grand larceny in reference to personal property, and to declare that everything which is personal property, which can be, or is held or enjoyed as personal property, is within the protection of the statute. It appears as though the Legislature, instead of entering upon a minute statement of the kinds or species of personal property which could form the subject of larceny, designed that this section should be construed in the most comprehensive manner. It is not more indefinite than is that still more comprehensive provision of the Constitution of this State, that no person shall be "deprived of life, liberty or property, without due process of law." If

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the meaning of the term "property" can be ascertained in the latter case, the meaning of the terms "personal property" certainly can be in the former.

The provision of the Constitution underwent judicial consideration in the case of *Wynehamer v. The People* (3 Kern., 378). That case will be remembered as involving the constitutionality of the late law to prevent intemperance in this State, the Court of Appeals deciding against the law. Comstock, J., in his opinion (p. 396), uses this language: "Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature property did not exist at all. Every man might then take to his use what he pleased, and retain it, if he had sufficient power; but when men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained." (*Tomlin. Law Dic. "Property,"* 2 Bl. Com., 39.)

"Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched."

If what is or what is not property depends upon the laws or usages of society, it would be impossible to say that the quality of the exclusive right of the owner to the use or enjoyment of his dog—his absolute power to sell and dispose of it, and the other characteristics and attributes of property—had not been impressed by these laws and usages upon that useful animal. If property is a notion of society—if common consent is the basis of or requisite to its recognition or maintenance—for none of the brute creation could this principle be claimed with more propriety or truth than this one.

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Assuming, then, that property is something which can be appropriated or donated to one's exclusive use or enjoyment—something which can be sold or otherwise disposed of at will—something, for a violation of our rights, in relation to which the law provides adequate remedies—something which it is not unlawful to hold, and which, therefore, the law is bound to guard us in the possession of—the inquiry arises, how are dogs looked upon or considered by the law.

In *Putnam v. Payne* (13 *John. R.*, 312), it was held that any person is justified in killing a ferocious and dangerous dog, which is permitted to run at large by its owner, or to escape through negligent keeping, the owner having notice of its vicious disposition. The action in the court below was to recover for the killing of a dog. The plaintiff had judgment; but the Supreme Court reversed the judgment, for the reason that, under the circumstances, the dog was properly killed. There was no question but what, if the dog had been improperly killed, the action would have been maintainable. This case concedes that there can be and is property in a dog. Whether absolute or qualified is immaterial—it is enough to satisfy our statute against the felonious taking of personal property, that there can be, or is any. In *Hinckley v. Emerson* (4 *Comst.*, 351), the right of property in a dog was expressly recognized. It was a similar action. The plaintiff, in the court below, proved the value of the dog to be ten or fifteen dollars, and had judgment; and the Supreme Court, on error, affirmed the judgment. The statute allowing dogs attacking sheep to be killed, was referred to by the court as proof that but for the statute the right did not exist. In *Bull v. Flagler* (23 *Wend.*, 354), which was an action of trespass for killing a dog, it was held that, though under proper circumstances the killing of a dog was justifiable, a needless or wanton destruction of the animal, even to prevent an acknowledged mischief, would be unjustifiable.

It was also held that the opinions of witnesses as to the nature of a dog, for whose destruction an action was brought, were admissible in evidence. In *Dunlap v. Snyder* (17 *Barb.*,

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S. C. R., 561), which was a similar action, the Supreme Court of the fourth district did not question the right to maintain an action for the improper killing of a dog. They reversed the judgments of the Justice and County Court, among other reasons, because the opinions of witnesses as to the value of the dog were received in evidence, thus rejecting upon that point the authority of the case of *Bull v. Flagler*. In *Cowen's Justice* (4th ed., § 563), in treating "of actions for taking, detaining or injuring personal property," it is said, the terms "personal property," as used in the Code of Procedure, include money, goods, chattels, things in action and evidences of debt, and, with the exception of real estate, everything in which one can have a valuable interest, instancing, among other things, a dog. In section 588, it is said, "A man has such an ownership in a dog, a cat, or any wild animal, which he has acquired a property in by possession, that he may recover damages for any injury to it." From these authorities I conclude that, if an action can be brought to repossess one of a dog, of which he has been unlawfully deprived, or if, in case the dog has been killed, an action can be brought to recover its value, and if, on the trial, its value is matter of proof, as that of any other admitted item of property, even though in certain extreme cases the dog may legally forfeit its existence to a stranger against the will of its owner, nevertheless, that there are sufficient of the characteristics or attributes of property about it to make it a subject of protection within the statute defining grand larceny. In the *People v. Maloney* (1 *Park. Cr. R.*, 593), it was held, for the purposes of a writ of *habeas corpus*, that a dog was the subject of larceny. It is provided by statute (2 *R. S.*, 5th ed., 974, § 1), that a tax upon dogs shall be annually levied and collected in all the counties of this State, except the county of New York, and the statute fixes the rate of tax, and the mode in which it shall be collected. It is also similarly provided that any person may kill a dog which he shall see "chasing; worrying or wounding any sheep," unless it is done by the direction of the owner of the sheep, or his servant.

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It is also provided that a justice of the peace may order the killing of any dog that shall attack a traveler on the highway, or a horse attached to a carriage, or upon which any person shall be mounted; and that any person in possession of a dog, or who shall suffer it to remain about his house for the space of twenty days previous to the assessment of a tax, or to any injury (as specified) done by the dog, shall be deemed its owner for all the purposes of the statute. The statute also imposes penalties where the owner refuses to kill a dog when legally directed or ordered to do so. I think these statutes demonstrate that the Legislature meant to treat dogs as property, protecting and controlling them, so far as the public good or safety permits or justifies.

In the year 1857 a law was passed in this State providing for the "incorporation of associations for improving the breed of domestic animals." It declares that any corporation formed under it shall have power to raise, import, purchase, keep, breed and sell all kinds of domestic animals. Why are not dogs within the purview of this statute? Although not ranked among domestic animals in the time of or by Lord Hale, yet the estimation in which they have been since held by society shows that they are no longer considered to be so base as not, on that account, at least, to be the subject of larceny.

If by domestic is meant "belonging to the house," who can deny this attribute to the dog? What animal more domestic? What one appreciates a home more, shows stronger attachments to it, or if it strays from it, is more certain to return to it? In some of its species it serves as a pet or a companion. In others, it assists and takes part in manly sports and recreations. In others, again, it is the faithful custodian and guardian of property. In none, it may be said, is it entirely divested of usefulness. When the benefits it confers are reflected upon, why is there not a perfect propriety in improving the breed of such an animal? If it comes within the description of domestic animals under this act of 1857, it is certainly property, the subject of larceny.

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If the indictment in the present case should show that the dog in question was "reclaimed and made tame and domestic," and that the defendant, with a knowledge of this, stole the dog, which would seem to have been necessary at the common law in reference to animals *feræ naturæ* (2 *East. P. C.*, 607), it cannot be sustained in its present form. Under the view I entertain, this is not necessary. The indictment shows that the dog was the property of the prosecutor, that it had a certain value, and that it was feloniously taken from his possession. Whatever else must be proved on the trial, can be proved under these averments.

If the court receives evidence it should not, under the indictment as drawn, the defendant can have his remedy by bill of exceptions.

My judgment is, that the indictment is good as one for grand larceny, and judgment must be rendered for the People on the demurrer, with liberty to the defendant to plead to the indictment.

Judgment for plaintiff.

SUPREME COURT. New York General Term, May, 1859. *Roosevelt, Lott and Sutherland, Justices.*

JAMES STEPHENS, plaintiff in error, *v.* THE PEOPLE, defendants in error.

Form of a judgment record on a conviction for murder, including an indictment for murder by poisoning.

On a trial for murder, it is competent for the court, without the consent either of the People or the prisoner, to permit a separation of the jury during the progress of the trial.

It is not error for the court to refuse to issue an attachment against a witness, on the application of the prisoner's counsel, after such counsel has stated that they have no other witnesses, and arrangements have been made for summing up the cause on both sides, and assented to by the court. The opening of the testimony in that stage of the case rests in the discretion of the court.

The objection that the judgment record does not show the prisoner to have been present in court during the whole of the trial, nor at the rendition of the verdict, is not available on error when it appears by the record that he was personally present at the impanneling of the jury and when the judgment was rendered, and when the return of the minutes of the court, made to a writ of *certiorari*, shows that the jurors were polled on giving their verdict, and that the prisoner was present on every day of the trial previous to the rendering of the verdict.

Exceptions to the exclusion of documentary evidence, though well taken, are not available where such documents were admitted in evidence at a subsequent stage of the trial.

Exceptions to the rejection of questions put to a witness, though well taken, are not available on error, where it appears that the counsel making the objection, while the witness was still in court, and before the opposite party had closed his case, withdrew his objections, and consented that all the questions which had been excluded might be put to the witness and answered by him.

A judgment will not be reversed on the ground of the admission on the trial of impertinent and immaterial evidence, if such evidence was harmless.

It is competent to ask a physician, on his cross-examination, to give his opinion whether certain symptoms, particularly specified, were those of arsenical poisoning, when the witness has previously given testimony in relation to the same subject matter, and where the symptoms inquired about are the same of which evidence had been previously given by another witness.

Where immaterial evidence has been taken without objection, it is too late afterwards to object to its effect, and it is not erroneous to refuse to strike it out.

Whether, after the defence has rested, the prosecution shall be permitted to call a witness in support of previous testimony, is a matter of discretion in the court, not reviewable on error.

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An anonymous letter, proved to have been written by the prisoner and sent to S. C., reflecting upon the character of S. B., a young lady of whom S. C. was the suitor, was held admissible in evidence against the prisoner, on a question of motive, on a trial for murder of the prisoner's wife by poisoning, it being charged, and there being circumstances tending strongly to show, that the object of the prisoner in committing the alleged murder, was to enable him to marry S. B.

The expression, by the court, of an opinion upon the weight of evidence, in charging the jury, is not ground of error, when the court also told the jury they were the judges of all questions of fact, and that they were to determine them without reference to any opinion expressed by the court.

Symptoms of poisoning by arsenic, and of the appearances on *post-mortem* examination in cases of death by poison, as described by witnesses and proved by eminent physicians and chemists.

Circumstantial evidences of guilt on a trial for murder by poisoning with arsenic. Charge to the jury of Mr. Justice Roosevelt, on the trial before the Court of Oyer and Terminer.

The following propositions, charged by the judge on the trial, were affirmed by the court:

1. The counsel for the prosecution having read to the medical witnesses certain symptoms from a paper marked by the judge, and inquired their opinion as to the cause of death in a case where such symptoms existed, if the jury believe that the symptoms of which Mrs. S. (the person alleged to have been poisoned), complained in her lifetime, are not in all respects the symptoms stated in the paper read to the physicians, that then the medical opinions are not admissible as competent evidence to be weighed by the jury, and cannot be taken into consideration.
2. If the jury are of opinion that the body of Mrs. S., after being exhumed for analysis, was so exposed that access could be had to it by other parties than those who made the *post-mortem* examination of the body and conducted the chemical analysis, under such circumstances that they could have applied arsenic to it, and particularly if they believe that R. B., one of the witnesses for the prosecution, who first charged the prisoner with poisoning his wife, actually had access to the body and tampered with it, so much of the analysis as was made after the body was so exposed and tampered with, is not competent evidence against the prisoner, and should be disregarded by the jury.
3. Where a prisoner is charged with the commission of a crime, and evidence of good character is introduced by him, which is not controverted on the part of the People, such evidence is to be considered by the jury, and is not merely of value in doubtful cases, but will of itself sometimes create a doubt when, without it, none could exist; and if good character be proved to the satisfaction of the jury, it should produce an acquittal, even in cases where the whole evidence slightly preponderated against the accused.
4. When a charge depends upon circumstantial evidence, it ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.

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5. If the jury, upon considering the whole of the evidence, have a reasonable doubt of the guilt of the defendant of the offence charged in the indictment, it is their duty to acquit.
6. If the jury believe that R. B. attempted to assassinate the prisoner before his arrest upon the charge of poisoning his wife, and that he entertained feelings of animosity and hatred towards him, and if the jury believe that S. and F. B. are also hostile towards the prisoner, and have quarrelled with him, that then they should consider these matters in weighing the degree of credit which is to be given to their testimony.

Form of a writ of *certiorari* to the Oyer and Terminer to bring up certain papers not constituting a part of the judgment record.

THIS case came before this court on a writ of error directed to the New York Oyer and Terminer; in return to which writ the clerk of such court returned the following record of conviction :

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City and County of New York, ss:

Be it remembered, that at a Court of General Sessions of the Peace, holden at the City Hall, of the city of New York, in and for the city and county of New York, on the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-eight, before George G. Barnard, Esquire, Recorder of the said city of New York, justice of the said court, assigned to keep the peace of the said city and county of New York, and to inquire by the oaths of good and lawful men of the said county, of all crimes and misdemeanors committed or triable in the said county, to hear, determine and punish according to law, all crimes and misdemeanors in the said city and county, done and committed.

By the oath of Benjamin F. Camp, foreman, Simeon Baldwin, Simon Bache, Joseph M. Cooper, Daniel M. Devoe, Alfred Decker, Charles W. Foster, Alexander Frazer, Joseph W. Haven, Henry W. Hunt, John C. Hines, George R. Lockwood, Joseph W. Meeks, Henry Marks, Hamilton R. Searles, James B. Taylor, Norman White, Aaron N. Cohen, John Denham, William H. Dodge, William McArthur, Thomas Trainer, Martin Waters, then and there duly charged and sworn to inquire for the People of the State of New York in and for

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the body of the said city and county, it was then and there presented as follows, that is to say :

City and County of New York, ss :

The jurors of the People of the State of New York, in and for the body of the city and county of New York, on their oath present :

That James Stephens, late of the first ward of the city of New York, in the county of New York aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought, wickedly contriving and intending, one Sophia Stephens, with poison, willfully, feloniously, and of his malice aforethought, to kill and murder, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and fifty-seven, and at the ward, city and county aforesaid, with force and arms, in and upon the said Sophia Stephens, then and there being, willfully, feloniously, and of his malice aforethought, did make an assault, and a certain quantity of a certain deadly poison, called and known as arsenic, to wit, three drachms of arsenic, willfully, feloniously, and of his malice aforethought, and well knowing, then and there, the said arsenic to be a deadly poison, did give and administer to her, the said Sophia Stephens, to take and swallow down into her body ; and the said Sophia Stephens, afterwards, to wit, on the day and year aforesaid, at the ward, city and county aforesaid, the said deadly poison, to wit, the said three drachms of arsenic, so as aforesaid given and administered, by the persuasion and procurement of him, the said James Stephens, did take and swallow down into her body ; and thereupon the said Sophia Stephens, by the poison so as aforesaid given and administered by the said James Stephens, and so taken and swallowed down into her body as aforesaid, became then and there mortally sick and distempered in her body ; and the said Sophia Stephens, of the poison aforesaid, and of the mortal sickness and distemper occasioned thereby, as aforesaid, from the said twenty-second day of September, in the year aforesaid, until

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the twenty-third day of September, in the same year aforesaid, at the ward, city and county aforesaid, did languish, and languishing did live; on which said twenty-third day of September, in the year last aforesaid, she, the said Sophia Stephens, of the deadly poison aforesaid, and of the mortal sickness and distemper thereby occasioned, as aforesaid, did then and there die.

And so the jurors aforesaid, upon their oath aforesaid, do say: That the said James Stephens, her, the said Sophia Stephens, in manner and form aforesaid, and by the means aforesaid, on the day and year last aforesaid, at the ward, city and county aforesaid, then and there, willfully, feloniously and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said James Stephens, late of the ward, city and county aforesaid, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and fifty-seven, at the ward, city and county aforesaid, contriving and intending, one Sophia Stephens, willfully, feloniously and of his malice aforethought, to kill and murder, with force and arms, in and upon the said Sophia Stephens, then and there being, willfully, feloniously and of his malice aforethought, did make an assault, and a large quantity, to wit, four ounces of laudanum, being a deadly poison, willfully, feloniously and of his malice aforethought, did give and administer unto her, the said Sophia Stephens, to take, drink and swallow down into her body, he, the said James Stephens, then and there well knowing the said laudanum to be a deadly poison, and the said Sophia Stephens, the said laudanum so given and administered unto her by the said James Stephens as aforesaid, did then and there take, drink and swallow down into her body, by means of which said taking and swallowing down, the said Sophia Stephens became and was mortally sick and distempered in her body, of which said poisoning and

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mortal sickness and distemper, the said Sophia Stephens, from the said twenty-second day of September, in the year last aforesaid, until the twenty-third day of September, in the same year aforesaid, at the ward, city and county aforesaid, did languish, and languishing did live, on which said twenty-third day of September, in the year last aforesaid, the said Sophia Stephens, of the deadly poison aforesaid, and of the mortal sickness and distemper thereby occasioned as aforesaid, did then and there die.

And so the said jurors aforesaid, upon their oath aforesaid, do say: That the said James Stephens, her, the said Sophia Stephens, in manner and form aforesaid, on the day and year last aforesaid, at the ward, city and county aforesaid, then and there, willfully, feloniously and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

JOSEPH BLUNT, *District Attorney.*

And the said James Stephens, afterwards, to wit, on the twenty-third day of December, in the year of our Lord one thousand eight hundred and fifty-eight, at the place last before mentioned, before the said justice above named, came in his own proper person, and being brought to the bar here in his own proper person, and arraigned upon said indictment, and having heard the said indictment read, and being asked whether he demanded a trial upon the said indictment, answered that he does require a trial thereon, and says he is not guilty thereof; and thereupon for good and ill is put upon the country, and Joseph Blunt, Esquire, District Attorney, for the city and county of New York, who prosecutes for the People of the said State of New York, in their behalf doth the like. And on motion of Joseph Blunt, Esquire, District Attorney as aforesaid, ordered that the said indictment be sent to the next Court of Oyer and Terminer, to be held in and for the city and county of New York, to be there determined according to law. And afterwards, to wit, on the third day of January, in the

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year one thousand eight hundred and fifty-nine, at a Court of Oyer and Terminer, held in and for the city and county of New York, at the City Hall of the said city, before the Honorable James J. Roosevelt, one of the Justices of the Supreme Court of the State of New York, and judge of the said court, being the next Court of Oyer and Terminer held in and for the city and county of New York, the said indictment was sent to and received by the said last mentioned court, to be determined according to law. And afterwards, to wit, on the seventh day of March, in the year last aforesaid, at the said Court of Oyer and Terminer held in and for the said city and county, before the Honorable James J. Roosevelt, one of the Justices of the Supreme Court of the State of New York, and Judge of the said Court of Oyer and Terminer, the process and proceedings aforesaid, before the court aforesaid, having been continued by due course of law, being as yet of the same January term of the said Court of Oyer and Terminer, held in and for the city and county aforesaid, on which said last mentioned day comes the said James Stephens, and Nelson J. Waterbury, Esquire, District Attorney for the city and county of New York, likewise comes; therefore let a jury thereupon immediately come before the court last above mentioned, of free and lawful men of the said city and county, each of whom hath, &c., by whom the truth of the matter may be better known and who are not of kin to the said James Stephens, to recognize upon their oath whether the said James Stephens be guilty of the murder and felony, in the indictment aforesaid above specified, or not guilty. And the jurors of the said jury, by John Kelly, Esquire, the sheriff of the city and county of New York, for this purpose impaneled and returned, to wit: Alfred Brush, Henry C. Hall, Marcus Hunter, Robert Lewis, Carrington M. Fuller, Augustus J. Gillett, Charles E. Hadden, Casper Trumpey, Abraham Gump, James M. Marsh, Lemuel Hayward, George Ackerman, who being called, come, and who being then and there elected, tried and sworn, well and truly to try, and true deliverance make between the People of the State of New York and the said James Stephens, then at the

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bar, whom they should have in charge upon the said indictment, and a true verdict give according to evidence; and forasmuch as it appears to the court here that justice cannot be done if this court proceed without interruption upon the said trial, the same is continued by adjournment from day to day until the twenty-sixth day of March, in the year last aforesaid, upon which said twenty-sixth day of March, in the year aforesaid, the jurors of the said jury, upon their oath say, that the said James Stephens is guilty of the murder and felony above charged in the form aforesaid, as by the indictment aforesaid is above alleged against him. Whereupon a day is given to the said James Stephens to hear judgment upon the said verdict, to wit: on Thursday, the thirty-first day of March next, in the same January term, to which day the proceedings aforesaid are continued, at which day and place, before the court aforesaid, and before the justice aforesaid, come the said James Stephens, in his proper person, and Nelson J. Waterbury, Esquire, District Attorney aforesaid, who thereupon moves for judgment upon the said James Stephens, according to law. And upon this it is demanded of the said James Stephens, whether he hath or knoweth anything to say wherefore the said justice here ought not, upon the premises and verdict aforesaid, to proceed to judgment against him, who nothing further saith, unless as before he had said.

Whereupon all and singular the premises being seen, and by the same court here fully understood, it is considered, ordered and adjudged by the said court, that the said James Stephens, for the murder and felony aforesaid, whereof he stands convicted as aforesaid, be taken hence to the city prison of the city of New York, from whence he came, and on Friday, the twentieth day of May, then next ensuing, and then and there be hanged by the neck until he be dead.

NELSON J. WATERBURY,
District Attorney.

Judgment signed this twelfth day of May, in the year one thousand eight hundred and fifty-nine.

J. J. ROOSEVELT,

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To this record of conviction was annexed the bill of exceptions, by which it appeared that, at the trial, evidence was given, a portion of which was as follows:

Dr. Josiah Cadmus, called for the People and sworn: I attended Mrs. Stephens during her last illness; I paid her two visits—one upon the 6th, the other upon the 7th of September, 1857; don't recollect what I prescribed; I think she was troubled with nausea, sickness of the stomach, or weakness; there was nothing in the occurrences of the 6th and 7th of September that left any distinct impression on my mind; I did not call again; the reason I did not, was because I attended the prisoner's family some six or seven years previously, and he disputed my bill, on the ground that he had not sent for me as many times as I had charged; so far as my own knowledge was concerned, I considered Mrs. Stephens healthy; I do not know personally anything to the contrary; she was a large-sized woman.

Dr. Francis W. Iremonger, called for the People and sworn: I attended Mrs. Stephens during her last sickness; I first saw her four or five days before her death; I found her in bed suffering from vomiting and pain in the stomach, increased by pressure, the usual symptoms of inflammation of the stomach; she was a great deal debilitated; she said very little to me, and I do not recollect any of her words; I did not hear her complain of thirst, but from the other symptoms she must have been thirsty; I did not suspect at the time that arsenic had been administered; she had inflammation of the stomach, I have no doubt; the effect of arsenic is to cause inflammation of the stomach; I recollect my first prescription; it is dated the 18th of September, 1857; my last visit was made about thirty-six or forty hours before Mrs. Stephens' death; I gave a certificate of the cause of her death; I stated it to be inflammation of the stomach.

The witness, among other things, further testifies as follows: I understood that Mrs. Stephens had been sick some two weeks when I first visited her; I so understood from the prisoner, I think; I do not recollect how long she had been con-

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fined to her bed; I am sure that I visited her as many as three times; I prescribed for her upon my first visit; I recollect only one prescription afterward; the prescriptions were put up at Shipley & Vanderhoof's.

(Here a book purporting to be the prescription book of Shipley & Vanderhoof was shown to witness, and he testified as follows:)

I presume that the prescription in my handwriting, dated September 18th, 1857, was ordered by me for Mrs. Stephens; it is for some nitre and Dover's powders, and read as follows: "Nitre, $\frac{1}{2}$ drachm, Dover's powders 12 grains, divided into six parts." I find another prescription in this book in my handwriting, dated September 19th, 1857, but I do not recollect whether or not I prescribed it for Mrs. Stephens; I have no recollection of it; it is as follows: "Quinine 20 grains, ox-gall a drachm, made into twenty pills." The next prescription in my handwriting I recollect distinctly; it is dated September 20th, 1857; it is for a Spanish fly blister; I distinctly recollect prescribing this for Mrs. Stephens; there is also an ointment of simple cerate and morphine; the blister is numbered 3824, and the ointment 3825; the next prescription given by me is numbered 3851; it is morphine and sugar, and was ordered by me on the 21st of September, but I have no recollection of ordering it for Mrs. Stephens; it reads: "1 grain morphine, and white sugar 10 grains, to be divided into four powders;" I ordered the blister to be applied to the pit of the stomach, to stop the pain, vomiting, &c.; her symptoms on my second visit were about the same as on the first; I stopped visiting Mrs. Stephens because I was told that I was not wanted; that there was no necessity for me to come again; I cannot say positively I was so told by the prisoner, but it is my impression that he told me; I have no recollection of at any time prescribing laudanum for Mrs. Stephens; I am as certain that I did not as I can be of anything; it is not my habit to do such a thing; I prescribed some lager beer to her at my last visit; I did not prescribe brandy for her at all; I gave a certificate that she died of inflammation of the stomach; I

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last saw her thirty-six or forty hours before her death; Mrs. Stephens appeared to be a large, fleshy woman; during my visits I saw the prisoner; he was always present except at one visit, when he came in just as I was leaving.

The witness being cross-examined, among other things, testified as follows: I have never given sulphate of quinine mingled with arsenic; if a person had taken several doses of arsenic, there would most likely be serious burning in the throat, and also at the pit of the stomach; the eyes appear sunken from the swelling under the lids; I did not see the body after death; the prescriptions I testified about on my direct examination, did not contain any iron, nor any adulteration of arsenic, and if put up as ordered there was no arsenic in them; there is no adulteration of quinine by arsenic that I know of; Fanny Bell was present at my visits to Mrs. Stephens; I was examined as a witness before the coroner; so far as I know, I was asked if Mr. Stephens made use of any expressions about his wife other than that she was ill, and so far as I know I answered that he did not, that he was only anxious about her health; I said at the coroner's inquest that I had not then any suspicions that she was poisoned.

The *direct examination* of the witness being resumed, he testified, among other thing, as follows: I have never seen either Sophia or Fanny Bell at my office; Mrs. Stephens' sickness was not a case of cholera, nor of cholera morbus, nor of bilious colic; I never knew a person to be sick two weeks of bilious colic.

Stephen H. Vanderhoof, a witness, sworn and examined on the part of the prosecution, testified, among other things, as follows: I am an apothecary doing business at the corner of Twenty-seventh street and Third avenue, of the firm of Shipley & Vanderhoof. (The prescription book shown to Dr. Iremonger being also shown to this witness, he further testified as follows:) All the prescriptions we put up from written prescriptions for the month of September, 1857, were entered in this book; during the week previous to the 23d of September, the four following prescriptions, written by Dr. Iremon-

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ger, were put up by me, to wit: The first on the 18th of September, numbered 3795, is nitre and Dover's powders; the next, on the 19th of September, numbered 3811, is quinine and ox gall; the next, on the 20th of September, are blister and ointment, and are numbered 3824 and 3825, and the next is on the 21st of September, numbered 3851, and is sulphate of morphine and sugar; these are all; I state positively that these four prescriptions were put up as written, and by myself; the articles put up in the prescriptions were pure, and did not contain any arsenic.

Sophia Bell, called and sworn for the People, testified, among other things, as follows: I reside at No. 69 Third avenue, and am twenty-five years of age; was born in the county of Cavan, Ireland; was the niece of Mrs. Stephens, the wife of the prisoner, and have resided in this country about seven years; I knew the prisoner in Ireland; saw him at my father's and grandfather's house in Ireland; I remember when the prisoner and my aunt were married; it was about ten or eleven years since; I remember their leaving Ireland to come to this country; it was about two or three years before I came; I came to this country with Mrs. and Miss Francis; after arriving here I went to board, and the prisoner came for me and took me to his house; after which I wrote to my father how kind the prisoner and his wife had been to me; and my father then wrote to me that I should be guided by them in every way; I remained in their family from three to five months, as near as I can remember; since I came to this country I have been a seamstress, and am at present a dressmaker; prior to my aunt's sickness I worked at my trade in this city; my aunt died at No. 166 East Twenty-seventh street; at the time of her death the prisoner's family consisted of himself, his wife and his daughter; and my sister and myself also lived with them; it was a three-story house, and the prisoner occupied the third floor, consisting of four rooms; Dr. Cadmus first attended my aunt during her last sickness; I saw him at the prisoner's house twice; his first call was in the forenoon; my aunt was out to market when he arrived; he called at the suggestion of the prisoner; my aunt

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was complaining of an affection in the chest, a burning, and the prisoner said he would have to send for the doctor; she said "Never mind the doctor at present," as she thought he was not required; he insisted upon the doctor's coming; she went to market, and when the doctor came I told him where she was gone; I suppose the prisoner went after him, because he said he would send him around, and then left the house; my aunt told the doctor she thought something was the matter with her lungs, and wanted him to examine them; he said he could not conveniently then examine them, as he had no instruments with him, but that if she would come round to his office he would examine her chest; he came the next day and examined her chest and lungs; he did not prescribe for her that day; he said that if some person would come around, he would give her something; he thought there was nothing the matter with her chest; Mrs. Stephens was large and very stout; she weighed a hundred and sixty pounds two or three months before her death; before her last sickness, she did the work of her own family; before Dr. Cadmus made these calls, I had never seen a doctor there, except when Mrs. Stephens was confined at the birth of her child, about seven years ago; the child was born the day before I arrived, as I understood; when I arrived I saw Dr. Cadmus attending on my aunt; I think Dr. Iremonger attended my aunt the greater part of the last week previous to her death; between Dr. Cadmus attending her and Dr. Iremonger's calling, she was complaining; she would be a part of the day in bed and part of the day up; she appeared to grow worse while Dr. Iremonger was attending her; after Dr. Cadmus had stopped calling she still complained of the burning; she said it seemed like a ball of fire rolling; she would feel it in her stomach, and sometimes up in her throat, and she said she thought she could put her finger down her throat and feel it; I heard her complaining of the heat in her chest previous to Dr. Cadmus coming: but the burning still grew worse, and increased till she died; I did not hear her use the words "ball of fire," until after she was confined to her bed; about the time that Dr. Iremonger first visited her, I heard her

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use this expression, "ball of fire," frequently, to almost every person who came in; she said frequently in my hearing that if she would neither eat nor drink she would be better; after eating and drinking she vomited severely, and there was a great deal of pain for her to vomit; she had to catch hold of the bed and strain herself very hard when vomiting; sometimes she vomited immediately after eating, and sometimes a long time would elapse before vomiting; she did not always vomit directly after eating; I do not know what she eat after her sickness, for I was there only a part of the time; I was working in Fifty-second street, between Fourth and Fifth avenues, at dressmaking; my sister, Fanny Bell, attended on her during her sickness; I remained at home two or three days, all day, with her, because she was much worse on the mornings of those days; it was while Dr. Iremonger was visiting her; I saw Mr. Stephens give her drinks—tea, lager beer, lemonade, buttermilk and coffee; I saw him give her no other kind of drinks; I saw him give her pills first, after Dr. Cadmus had called; he gave her laudanum two or three times in her drinks; my aunt was moaning, and Stephens said he would give her a little laudanum so that she might go to sleep and feel better when she awoke; he gave her this in lager beer or tea about a week before she died; on the afternoon preceding my aunt's death, when I returned from work, I went into the room to see my aunt; it was dark; my aunt was lying on the bed and breathing very hard; Stephens was in the room alone with my aunt; he was giving her something out of a tumbler, and told me to leave the room, which I did, and he shut the door; he told me my aunt was asleep; I was confused and frightened, for she was breathing so hard, and I returned to the room in a few minutes; Stephens was sitting in a chair by her bed; Mr. and Mrs. Pullman called; I went into the sitting room where they were, and I could hear my aunt breathing in that room; Mrs. Pullman told me not to let my aunt remain so long in that condition, as she would be exhausted, and I must wake her up; I remained in the sitting room until they left; it was raining very hard at the time; I

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then run into my aunt's room, got her in my arms, pulled her up in the bed, and said I was determined to speak to her once more; I then shook her; when she woke she said to me, "Where have you been all day, that you have not been to see me?" she put her arms around me, and said she was going to die, and wished me to take care of her child; she said, wherever I was, if I possibly could, I must see her child and take care of her; she committed her to my care; she asked to see my sister Fanny, and Fanny came in; she then folded her arms round Fanny, and said she hoped we would both meet her in heaven; that she was going to die, and felt happy; she asked my sister and me to sing for her, and we did; this was about nine o'clock, as near as I can remember; while we were singing, Mr. Armstrong, a class leader in Twenty-seventh street church, came in and prayed with my aunt; then the prisoner and his sister, Mrs. Susan Hannah, and her daughter, Maria Hannah, came in; previous to their coming in, I was obliged to ask Mr. Armstrong to leave the room, because my aunt was vomiting, and then her bowels began to change; my aunt died about three o'clock, Wednesday morning, 23d of September, 1857; I was not in the room when my aunt died; I was in the sitting room; Mr. Davis came in that evening; several times in the course of the evening my aunt vomited a good deal, and had discharges from her bowels; at different times said she felt quite numb, without hardly any feeling on one side; frequently, when discharges came from her bowels, she would ask me to raise her up; the only means I had to raise her was to get upon the bed and raise her up in that way; the last time she was raised, and as she was about to be laid back, she gave an awful shriek, which frightened me; Mr. Stephens and Mrs. Hannah wished to keep her still, so I left the room and went into the sitting room; the lamp was taken out of her room, and the room was kept dark until she died; Mrs. Hannah and my sister, Fanny Bell, I think, were in her room when she died; while Mrs. Hannah and I were laying her out, about a quart of black liquid altogether came from her mouth; she was lying upon her back upon the floor when the first came

out, and when she was turned over upon her side it came more freely from her mouth; between nine and ten o'clock she put her arms around the prisoner's neck and told him she was going to die, and wished him to meet her in heaven; when we were laying my aunt out, we removed a chest, standing on legs, about one foot long, for the purpose of having more room; I found a tumbler under this chest, and examined it; there was a very little liquid in it, and it smelled of laudanum; I had taken laudanum myself frequently before this time, and was acquainted with the smell of it; on Tuesday morning preceding my aunt's death, about seven or seven and a half o'clock, A. M., as I was going out to work, Mr. Stephens told me to stop at Dr. Iremonger's, and tell him not to come again till he was sent for; if he was wanted again, he, Mr. Stephens, would call for him; I told Mr. Stephens I would not do it; he then took his hat, left the room, and said he would go and tell him himself; when I went down stairs on my way to work, Mr. Stephens was standing on the stoop; he again asked me to stop on my way, and tell Dr. Iremonger not to come; I told him I would not—that I was going to ride; when I left the house he was standing on the stoop, and I took the Third avenue car; prior to my aunt's last sickness, Stephens refused to take her to any place, and spoke roughly to her; he did not treat her as a husband should treat a wife; he would frequently tell her to hush up, would speak roughly to her, and I heard him say he wished she was dead; this was two or three months before my aunt's death; he very commonly used such expressions as I have before stated to her; he commenced using this language some time previous to her death; I noticed it more particularly about ten or twelve months before her death; when I first came to this country, his conduct was very good towards her, in my estimation; my aunt's age at the time of her death was 46 years; Mr. Stephens' age was 82 years, as he said in my hearing, but I do not otherwise know his age; at the time of my aunt's death, I was receiving the addresses of Mr. Samuel Cardwell, real estate agent and dry goods merchant; his store is 496 Third avenue; the first I ever spoke to him was

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at a Sabbath School pic-nic of the Twenty-seventh street Methodist Church, in the summer of 1857; he commenced visiting me at my aunt's residence, in the summer before her death; he called upon me there frequently; after my aunt's death, about a month, Mr. Stephens said to me that he wished me to remain at his house, and not go out to work any more, as I had been out to work long enough; he also said that he would like to get engaged to me, as there were other young ladies in the Third avenue who would like him to pay attention to them, and he did not wish to affront them; I have frequently seen Mr. Stephens write, and am well acquainted with his handwriting; after my aunt's death, a day was fixed for my marriage with Mr. Cardwell; I cannot tell the month; it was in the summer of 1848; we were to be married in the Twenty-seventh street Methodist Church; the time fixed was the day after Mr. Cardwell received an anonymous letter; our intention to be married at that time was known to a great many; we were not married at the time fixed, because of the anonymous letter; Mr. Stephens had written to Mr. Cardwell the day previous; I have seen that letter. (The letter is shown to the witness, who testified further): This is the letter; this is in the prisoner's handwriting; Mr. Cardwell and myself have not yet been married; upon the receipt of this letter, Mr. Cardwell, my brother, Robert Bell, and myself, went to Chester, in Orange county, and remained a short time; I never saw Mrs. Stephens vomit before her last sickness; she vomited a good deal; she would vomit about half a basin full at a time; the vomited matter was of different colors; sometimes it was yellowish, at other times dark; I was present myself when she vomited on some occasions; I remember her vomiting once when Dr. Iremonger was there; Mr. Stephens was present many times when she vomited; I did not particularly notice the smell of the vomited matter; Mr. Stephens frequently emptied the vomited matter from the basin into the slop pail; Mr. Stephens several times carried the basin containing the vomited matter to the window; he asked me once or twice to look at it; there was something like little red spots in it, which he thought was

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some of her liver; the way he examined the contents of the basin was to turn it up one side, then took a straw and drew what appeared to be little pieces of flesh up against the side of the basin; she complained of pain in her breast and burning once to Dr. Iremonger, when he ordered a blister; this was Sunday previous to her death; she complained of extreme thirst about two weeks before her death, and as I noticed, down to the time of her death; the morning before her death, as I left the house, she was complaining of thirst; I did not notice her unusual drowsiness until the night previous to her death; on the Sunday previous to her death, her eyes were very sharp looking; I mean by sharp looking, that when she looked at you she looked very sharp; after her confinement to her bed, her countenance looked a little excitable sometimes, and at other times she looked careworn and fatigued; I heard her complain of coldness of her feet about a week before she died; she said her feet and legs felt cold; she would frequently close her hands, and said they felt queer, and she could not tell what was the matter with them; the night before she died she said her whole side was numb; she said she did not have any power in her hands or arms; two or three days before her death she complained of cramps, but I cannot say particularly what she said; she said she thought it queer that her feet and legs were continually cold, and asked Fanny Bell to put a warm iron to her feet to keep her warm; she complained of cold perspiration on her hands, and always kept throwing her arms outside of the clothes; while she was confined to her bed she had suppression of the urine; before her sickness her lips were thin and had fallen in by reason of the loss of teeth, but on the Sunday preceding her death, I noticed that her lips were swollen, and asked Dr. Iremonger if he noticed it; he said not particularly; after he left the house she examined her face in a looking glass, and said I was right, that her lips were swollen; the discharge on the evening previous to her death produced an offensive smell; it looked very dark on Tuesday morning; it seemed to me as if it was mixed with blood; the evening before her death her eyes looked very sharp at every

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person at whom she looked; she gave that horrible scream of which I have spoken, about 11 o'clock at night; I did not see her converse with any one after that, but she fell into a stupor, and so remained until she died; before she screamed she had a laughing expression of countenance, and talked to me about Mr. Cardwell, laughingly; the discharges from her bowels were accompanied with pain in her bowels; during her sickness she had a suppression of menstruation; William Knox is a cousin of mine; after Mrs. Stephens' death, a short time, William Knox came into the bedroom of myself and sister Fanny, and lay across the foot of the bed; at the first opportunity after that, I asked Mr. Stephens why he had sent William Knox into our room, and he said he could ruin our characters in the estimation of the public at large, if I and my sister left his house; William Knox did not get into our bed; he lay across the foot of it; when he first came into the room, I asked him where he was going, and he said Mr. Stephens had told him to come in there; when I accused Mr. Stephens of sending Knox there, he did not deny it; I could almost say that Mr. Stephens said that he told William Knox to go to our room; I told Mr. Stephens that William Knox had said that he had sent him there, and Mr. Stephens did not make any reply; when Stephens cast it up to me and my sister, that Knox had been lying on our bed, I told him that he had sent Knox there for his own purpose, and that William Knox told us that he had sent him to our room, and Mr. Stephens did not deny it; we remained at Mr. Stephens' house about six months after my aunt's death; when we left, we went to board with Mrs. Sherman, in Third avenue; when my brother, Robert Bell, arrived here, last July, I was at Mrs. Levy's in the Bowery, and my sister Fanny lived there with me; since Mr. Stephens' arrest, my sister and myself have boarded at 69 Third avenue; immediately after my aunt's death, my sister and myself talked of leaving; we wanted to get another place to live in; Mr. Stephens objected to myself and sister leaving, all the time and every way that he could, up to the time that we left; when Mr. Knox lay across the foot of our bed, he did

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not undress himself ; he did not get into the bed at all, but lay outside of the bed ; I came home on the evening preceding my aunt's death, between seven and eight o'clock, and found Mr. Stephens in her room ; he shortly after left her room, and remained in the sitting room a short time, and then went after Mrs. Hannah ; he came back very soon with her ; Mrs. Hannah's daughter came with them ; while he was gone, I took a light into my aunt's room and saw something dark on the side of her mouth ; I went to Greenwood cemetery when my aunt was buried ; I saw her buried ; I was present when her body was exhumed by the coroner ; Mr. Cardwell and my sister were present ; when the body was exhumed at Greenwood cemetery, the coffin was opened, and I recognized the body of my aunt ; we accompanied the coroner to Bellevue Hospital, where he deposited the body in the dead house ; and when the coffin was opened on the occasion of the *post-mortem* examination, I again identified it ; before my aunt's death ; and on the day of Mrs. John Stephenson's funeral, my aunt wanted to go to the funeral ; Mr. Stephens refused to let her go ; she insisted upon going ; he struck her, and gave her a black eye ; my aunt cried out that he was murdering her ; the flesh became black afterward around the eye where he struck her ; her eye continued discolored until she died ; I never mixed any medicine that was administered to Mrs. Stephens ; when Mr. Stephens proposed to marry me, about a month after my aunt's death, he said I could have him now as there was no barrier in the way ; and when I spoke of leaving, he said that would be treating the child very different from what my aunt requested me to do ; I asked him to let the child come with me, and he refused.

Being *cross-examined*, this witness, among other things, testified as follows : When I arrived in this country I stopped at Mr. Stephens' house three, four or five months ; I do not recollect the precise time ; I did not return there to board until the spring before my aunt's death ; but I called at his house almost every Sunday, and two or three times a week ; I was then a seamstress, and went out to work in the day and came home

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at night, except a few nights when it stormed; when Dr. Cadmus first called on my aunt, she did not want a physician; she said she did not need a physician then; she complained of an affection in her chest; Dr. Cadmus did not prescribe for her at his first visit; Dr. Iremonger was called in at my aunt's request; Mr. Stephens was constantly there when Dr. Iremonger called; there was a signal put up for him in the hall window (a white cloth), to bring him home; he required my sister to put it there when my aunt wanted medicine, and when the doctor came; I never gave her any medicine; she said she would feel better if she would neither eat nor drink; I first noticed the diarrhea the morning before her death; there was one injection administered to her the Sunday before her death; I do not know that I swore yesterday that I never saw her take anything that had laudanum in it; I know that he put laudanum in a drink and gave it to me to carry to her; the evening before her death I went into my aunt's bedroom; about the time of my going in, Mrs. Pullman came in; after I came I had some conversation with her; when I went in Mr. Stephens sat on the chair, with his elbows on his knees, and his head on his hands, and said she was asleep, and he thought she would feel better when she awoke; she breathed hard, and had a very queer expression on her face; it was after dark; I could see from the light that stood in the sitting room; there was no light in the bedroom; Mrs. Pullman said, "Do not let her lie long in that position, she will be soon exhausted;" after Mr. and Mrs. Pullman left I awoke her; I told Mr. Stephens I was going to; he said he thought I had better not yet awhile; I said I was determined to speak to her once more before she died, and I would wake her up; when I talked to her she would go off to sleep, and I kept shaking her; I heard her say she hoped he (Mr. Stephens) would prepare to meet her in heaven; he did not like to have her go with him anywhere; he said everybody was laughing at him because she was so much older than he; he said they called her his mother; it was not agreeable to Mr. Stephens that Mr. Cardwell should visit me; he was decidedly opposed

to our marriage; after the anonymous letter was received, Mr. Cardwell did not say he would not marry me; it was at my own request that the marriage was postponed; I did not wish to get married under the feelings that I then had; Mr. Stephens threatened to ruin our characters if we left him; Mr. Stephens attempted to commit a rape on me in the Fifth avenue; he did not succeed; he also attempted to commit a rape upon me at his house on New Year's eve, when I was sick; he went out with me a great many times; my aunt sent him along with me; she said she thought Mr. Stephens was my best guardian, and she said he was the best person I could trust myself with, as I had no friend here; when he asked me to marry him, I told him he must never again breathe such a thing in my presence; when I saw Mrs. Stephens at the time of her exhumation, her face was discolored, yet I recognized it; I knew the clothes that I put around her neck before she was put into the coffin; if I had seen the body anywhere else I should have recognized it; my aunt's black eye was not occasioned by her falling against a chest, but she told me, that she hit it against the chest, to conceal Mr. Stephens' villainy; I saw him mix powders and give them to her; there were a good many circumstances to prevent our leaving Mr. Stephens' house sooner than we did; Mr. Stephens was in the habit of destroying all our letters, or doing as he pleased with them, and all the letters that I received from Mr. Cardwell came through him; if I wrote to Mr. Cardwell, he would snatch up the letter and ask me if I would like to have it; he threatened to show them to Mr. Brandon and Mr. Mills; I was afraid to leave his house, for he said he would ruin my character and my sister's in the estimation of the people; that he would say such things about us as would excommunicate us from the church, and that he would ruin us in the city; the Twenty-seventh street church was about a block from Mr. Stephens' house.

Samuel Cardwell, called upon the part of the People: I made an engagement to marry Miss Sophia Bell; it was made, I think, August 16th, 1858; the marriage was to have been performed in the Seventeenth-street church, but the minister had

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gone into the country ; I went to the minister of the Second-street church, and found the minister at home ; we were to go at 2 o'clock next afternoon to his house ; the night of the day I called upon the minister, I received an anonymous letter which prevented my marriage. (Letter previously shown to Sophia Bell shown to this witness.) This is the letter I received ; about 9 o'clock in the evening before the day fixed for the marriage, I found this anonymous letter on my desk at home ; it had been brought by a boy, and received by some person in my store ; this is the letter I received ; I have the envelop in which that letter was inclosed, and this is it. (Envelop produced.) The following indorsement is on said envelop: "Mr. Cardwell, between Thirty-fifth and Thirty-sixth street, Third avenue."

The counsel for prosecution here offered to read said letter in evidence, but first offered to the counsel for the prisoner the said letter as a subject of cross-examination by defence, and the witness for cross-examination upon it. The counsel for the prisoner objected to the reading of said letter in evidence, for the reason and on the ground that the prisoner had a right to cross-examine the witness upon the question of its reception by him, and the facts connected therewith, and that the prisoner cannot be compelled to commence his cross-examination even upon this point until the prosecution had finished their examination in chief, and the witness is turned over to the prisoner for general examination.

The counsel for the prosecution here again offered the prisoner's counsel an opportunity to cross-examine the witness before the introduction and reading of the letter, which offer was declined. The letter was then read as follows :

"My dear sir: I send to you one or to Lines to Let you know that I was informed that you are Keeping company with a young woman whose name is Bell. I want to Let you Know some of her good Behavior. I was Brought on a trial her on uncel concerning of her and him, and he Refused to tell anything until we Put the Booke in his hand, and then he would

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not spake until there came witness against him, and he had to answer for himself. I went where she lived, in fifth avenue, and the lady told me about her which is not very good. I would not like to spak for some time Longer and you can ask her yourself and then you can judg for yourself, or ask her how she spent her nights when her ant was in the country, or when her ant and her sister was at the excursion, the man that went to the dore and herd them in the bed and she got up and Put a clought on the dore, this was all sworne before me and I now put you on your gard for you may here it yourself, you can go to that Lady and she will tell you she knows how she spent new years morning when I went into her uncel's and seen him and her in bed, she knows what she was doing and she was in church that night and went out and fainted and she sent in for her uncel and he went after them to his house. I know what I herd and seen, you can ask her and then you can judge for yourself it is a wonder she could have the face to Pass herself off on any man, she must think the are very Blind these are only a few things of what is against her, her good uncel and her will Be Brought where the will have to tell the truth and that very soon. Let you Be very wise and you can find it all out for as I Live I will make a example of him and her, for I never knew to grater villings than they were, and his wife alive, and I am told a very nice woman for the uncel was a raskel and she was not Better for she knew it was wrong. I will say no more now But I may soon meet you and I shall you some more about her Little none.

"don't be a foole for I am sure she could not Pass herself on you.

"Good by I am your friend when he was asked to clear her in the present of five he coud not do it for there was to many witness against him.

"You will soon hear more."

Before this letter was read, the witness had, among other things, testified as follows:

I commenced paying my addresses to Miss Sophia Bell in

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the summer of 1857; I visited her very frequently up to and since the time of Mrs. Stephens' death; after my second visit, Mr. Stephens objected to my visiting her; he told me that it was impossible that I could ever get the girl, because her father would not permit it; that she was a member of the church, and I was not; that it was a hopeless case, and therefore I had better not have anything more to do about it; he once begged and bantered me about it three hours; he insulted me grossly; he called me a two-faced shuffling fellow, and things of that import; this was some few weeks after my first acquaintance with Miss Sophia Bell; on several subsequent occasions he waited for me when I was visiting Miss Bell; on one or two occasions on the outside of the house, until I came out; when I came out he commenced to talk to me, and abused me just in the same way, in reply to which I told him that he could not possibly prevent me from seeing the girl—that he might forbid me his house, and of course I would not come there; but if he wanted to prevent me from seeing her and paying her attentions, he must talk to her; a short time after the death of his wife, perhaps some three or four weeks, he forbid me his house. (After the introduction of the said letter marked "A," the witness, among other things, testified as follows): My matrimonial engagement still exists; during Mrs. Stephens' illness I was at her house some three or four times; I observed a peculiarity about her countenance; she always had, during her sickness, a piercing and anxious-like expression, as though she was suffering pain and was anxious; she had a very inquiring, anxious look about her; the first time I called on her during her sickness, I observed she had a black eye; this was about two weeks before she died; I saw it afterwards, when she lay dead: I was present at the exhumation of Mrs. Stephens' body in Greenwood Cemetery; the two Misses Bell, the coroner, Mr. Cushing, the undertaker, and myself were there, and other parties with whom I was not acquainted; I returned with the Misses Bell to Bellevue Hospital, and was there when the coffin was brought there; it was opened in Greenwood Cemetery, and I recognized the

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body of Mrs. Stephens at once; it was again opened at Bellevue Hospital, and I looked at her body and there recognized it; during Mrs. Stephens' sickness she complained of a burning sensation at the pit of her stomach, like a ball of fire; she spoke to me about a physician, and I recommended Dr. Iremonger to her; prior to her last sickness, the prisoner acted toward her in a very rough, boorish manner; his manner and language were decidedly unkind, as I thought; I was impressed with that idea.

Fanny Bell, called and sworn for the People, testified, among other things, as follows: I reside at 69 Third avenue; am between nineteen and twenty years of age; Mrs. Stephens was my aunt, and Sophia Bell is my sister; I have been in this country a little over two years; on my arrival I stopped at the prisoner's house, and remained until after my aunt's death; she was taken sick about three weeks before her death; I do not remember of her being sick previously; she did all her own work, and the work of the family; before her sickness I worked at a millinery shop in Broadway; when she was taken sick I went home and attended her—attended her until she died; I was at home when Dr. Cadmus called; I know of his calling twice; the prisoner called him in; he said he would call the doctor in, and she said she did not require it; the first time the doctor called she was at market; he remained until she came in and for fifteen minutes longer; he prescribed nothing then; he called again next day; the first day she said that nothing was the matter with her, unless something might be the matter with her lungs; she said she felt some affection in her chest; the second time he examined her lungs, and said that nothing was the matter; that she would be well enough in a few days; I think Dr. Iremonger was called in about a week after that; during that week she was sometimes confined to her bed and sometimes able to sit up; she complained of burning in the chest and stomach; she complained more and grew worse towards the latter part of the week.

Q. During that one week, do you know whether your aunt partook of any fluid or not?

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The counsel for the prisoner objected to the question, which objection was overruled, and exception taken by the counsel for the prisoner.

A. The prisoner gave her some apples and oranges.

The witness further testified, among other things, as follows: He peeled them for her once or twice; don't know how many; once he cut an orange in pieces and gave it to my aunt; after eating she vomited, as she did always after eating during her sickness; she never vomited before; after eating that orange, she vomited in about five minutes; Dr. Iremonger was called in about three days afterwards; the prisoner first pared the orange, then cut it up, put sugar on it, put it on a plate, and gave it to my aunt; between the visits of Drs. Cadmus and Iremonger, she complained of burning of her chest, stomach, and of vomiting; she said she felt as if she had a ball of fire in her chest and stomach, and if she could only take that out she would get well; one day at dinner we had some rice at dessert; I prepared the rice; the prisoner put some on a plate and took it to my aunt; she was in bed; he put white sugar on it; I saw him do so; she commenced eating it, and he remained a few minutes and then left the house; after I got through dinner, I went into the room where my aunt was and sat down; she was eating it; she said she had taken enough, and that it was very good, and asked if I would not take some; I took some of it and then put it down; I was talking to her but a few minutes afterwards, when I felt my head grow dizzy.

The counsel for the prisoner objected to any testimony by the witness as to the effect of the rice upon her. The objection was overruled by the court, and exception taken by the counsel for the prisoner.

The witness, among other things, further testified as follows: I went to my own room and commenced vomiting; as I left my aunt's room I handed her a basin, and she was then vomiting; I continued to vomit until half-past five or six o'clock; my aunt got up in her night dress and came into my room, and told me that Bella had just come home from school, had eaten the rest of the rice, and she was vomiting also; my aunt

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said she would send for the prisoner; he said he would go for an emetic for me, and I said I could not take any; he insisted upon it and I refused, as I was then exhausted from vomiting; Mrs. Stephens had taken Bella into bed with her; Bella had vomited; I told him what my aunt said, that the child was vomiting; he went in, and when he returned to me he said the child was better; he gave me two glasses of salt and water, and said when I had vomited all off I would feel better; I do not know of his doing anything for Mrs. Stephens; before Mrs. Stephens ate this rice, I was conversing with her.

Q. What was the subject of that conversation?

Objected to by prisoner's counsel. Objection overruled by the court, and an exception taken by prisoner's counsel.

A. On the subject of my sister's marriage with Mr. Cardwell.

The witness further testified, among other things, as follows: My aunt was better the day she took the rice, before she took it; I lived with the prisoner from the time I came to New York until after my aunt's death; I observed the conduct of the prisoner and wife towards each other; the prisoner's conduct towards his wife was not generally what I would expect from a husband; if she offered to give her advice, he always objected, and said she was not capable, and used harsh expressions towards her; he would tell her to hush up, that she did not know; that he knew better than she—to dry up; sometimes he called her a fool and a liar, and said she was telling lies; she wanted to attend the funeral of John Stephenson's mother; she insisted upon attending the funeral with him; he dressed himself; she wanted him to wait for her; he refused, and struck her, and she called murder; this occurred in the sitting room; Mrs. Stephens cried and held her handkerchief to one of her eyes; she said I was not to speak about the prisoner's striking her; immediately after receiving the blow, it looked red around the eye, and then green black; traces of this black remained until her death; the prisoner's conduct was generally rough; his language was rough; his treatment to my aunt was not such as a wife should receive;

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when she spoke to him about anything, he would put up his clothes and tell her he was going to go away and leave her ; I heard him wish that he had never seen her ; I heard him wish that she was out of the way ; I heard him once or twice wish that she was dead ; this was about six weeks before she died ; two or three times when he threatened to leave her, he had stopped out late, and when he came home he said he had a very pleasant time, and talked of the young ladies that were there ; she talked about it, and was angry about it ; then he packed up his clothes and got them all ready to leave in the morning ; my aunt's age was 46 at the time of her death ; I heard him say he was 32 ; his bad treatment commenced about six months before my aunt's death, and grew worse until she died ; the prisoner always went to the druggist's to have Dr. Iremonger's prescriptions filled ; I saw the prisoner give my aunt powders and laudanum ; he gave her powders the Monday evening before she died ; she appeared a good deal better all that day, and when he returned with the powders she said that if she did not take any medicine she would soon get well ; that every time she took the medicine she got worse, and said he would not leave the room until she took it ; she took one that he prepared for her ; then she vomited, and her bowels were changed ; these powders were white and yellow ; they were in two papers and he mixed them ; my aunt was in bed when he did this ; some days before this time, he had four or six powders in a box ; he put these powders in a closet, and they were there after aunt died ; I never saw the prisoner bring powders into the house but twice ; I first saw laudanum on the morning of Tuesday, the day before my aunt died ; it was an ounce vial, and labeled Shipley and Vanderhoof, corner of Thirty-third street and Third avenue ; he poured the laudanum into drinks that he gave to Mrs. Stephens ; my aunt was in bed at that time, and the prisoner was in the sitting room and the other room when he did this ; he put this first ounce into lager beer and then in brandy, and gave it to her to drink ; when this first vial was used up, he went out and returned with another bottle of laudanum ; I saw him pouring

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this laudanum into a glass with brandy ; I asked him if this was laudanum he was giving her, and he said yes, that the doctor had ordered it ; she objected to taking brandy, but he said the doctor told him to give her brandy for her bowels ; the second bottle of laudanum was about the size of the first, and was labeled laudanum ; it was from some drug store in Second avenue which I do not recollect ; he administered this last bottle of laudanum to my aunt in brandy ; when this bottle was used up he went out and returned with half a pint of brandy, and a larger beer bottle of laudanum, without any label upon it ; it was nearly half as large again as this other bottle of laudanum ; when he came in with this laudanum I asked him if that was laudanum ; he said yes ; I asked him if laudanum would take a person's life ; he said yes, but that the doctor had ordered it for her—that it would not injure her, as her bowels were so bad ; he said that the doctor had ordered it for her bowels, that it would ease the pain ; he held this bottle of laudanum in his hands when he used these words ; he said this laudanum is strong enough to take the life of three men, but that it would not injure her ; he procured this last laudanum between 12 and 1 o'clock in the day ; he gave this last bottle of laudanum in the last half pint of brandy ; the first vial I saw about 9 o'clock in the morning ; the prisoner administered her medicines during her sickness ; he did not stay home with her all day, except the day before her death ; he directed me to put a cloth as a signal when the doctor came, and when she was to get medicine, and I always followed his instructions ; the prisoner was with her all day on Tuesday before my aunt's death ; in the morning of that day he asked my sister Sophia to stop at Dr. Iremonger's, and ask him not to come ; she refused ; he said he would go himself ; left the house, and was gone ten or fifteen minutes ; I was not in my aunt's room all the day, except to look at her, until half-past six in the afternoon ; Mrs. Hannah and the prisoner were in the room all that day ; the prisoner said that I only excited her by going into her room—that it was better to let her sleep ; the door leading into my aunt's room was nearly closed all

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day; about half-past six the prisoner left my aunt's room and passed through the sitting room; then I went into my aunt's room, and the prisoner came in; he said I had better come out again and not excite her; after that time she told me she thought she was going to die, and when she was gone she wished myself and Sophia to see to this; just then the prisoner came into the room; I did not administer any medicine to Mrs. Stephens; Mrs. Foley and another lady came to the prisoner's house the day my aunt, the child and I were sick from eating rice; the Sunday before my aunt's death a blister was applied to the pit of her stomach; she was vomiting most all that day; the vomiting did not relieve her; from the time she first fell sick, the prisoner said if her bowels changed, she would not live twenty-four hours after that; five or six months before my aunt's death, I noticed his paying particular attention to my sister. (Here the witness detailed what those attentions were.) The prisoner also told about Mr. Cardwell what I knew to be untrue; he also objected to her marrying Mr. Cardwell; he said that Cardwell was a low, shuffling, mean fellow—that he had sent his own daughter away from his house, and had poisoned his wife; this was after Mrs. Stephens' death, about a month; the prisoner continued to pay these attentions to my sister until we left the house; one night our cousin William Knox came into the room where I and my sister were sleeping, and lay across the foot of the bed, on the outside of the bed clothes; he kept his clothes on; William said the prisoner directed him to do so, and when I charged the prisoner with having sent William Knox, and told him that William had said so, he laughed and did not deny it; always when we wanted to leave the house, he brought this up to us; the prisoner administered to his wife, during her sickness, brandy, lager beer, porter, ale, milk and water, tea and coffee and lemonade; the first thing she complained of was an affection in her chest, a burning heat and red specks before her eyes, with dizziness; then she complained of a heat in her chest, and thought that her lungs were ailing; the heat was first in the pit of the stomach; she complained of this before Dr. Cad-

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mus was called—in three or four days, I think; it was not severe then; afterwards she said there was a burning pain in her chest, like a ball of fire; the heat in her chest grew worse every day; she spoke of the burning pain after Dr. Cadmus called—perhaps two days; it increased every day during her sickness; I first noticed my aunt's vomiting shortly after Dr. Cadmus called; she did not vomit very frequently at first; the matter vomited was of a yellowish color; it presented this color for some days, when it changed, and became of a dark green color; then it seemed darker each time until she died; I saw the prisoner take the basin to the window two or three times, and there were red spots in it, and he said he thought it was part of her liver; something would always stay in her mouth; she would have to rinse it out; if you put a piece of wood or straw through the vomited matter, it would draw it up; she said she felt as if the ball of fire would come up from her chest to her throat; she was always thirsty, constantly wanting cold drinks; her countenance changed very much; she seemed very languid and anxious, and her eyes were considerably sunk; for two or three days preceding her death, she did not answer questions readily; her limbs grew weaker during her whole sickness; in the last week her hands were numb; she kept feeling everything, and trying to see if she had any proper feeling in her hands; her legs and feet became swollen; they began to swell two or three days before she died; they became cold; I felt them; she complained that she could not use her feet and limbs, and asked me to put something to them to warm them; she threw her arms around the bed almost constantly, catching hold of something; her lips were swollen; her face turned red; when diarrhea set in, just before her death, the discharges were of a dark color, and were very offensive; the diarrhea continued until about two hours before she died; it commenced about Monday night, at eleven o'clock, before she died; about a week before her death, there was suppression of urine, accompanied with pain, which continued until her death; her diarrhea was also accompanied with severe pain.

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John Cantrell, called and sworn for the People, among other things testified as follows: I am an undertaker, and had charge of the funeral of the mother of John Stephenson; it was about the twenty-eighth of August, 1857; I also had charge of the funeral of Mrs. Sophia Stephens; it took place on the twenty-fourth of September, 1857; the prisoner, I think, gave me instructions about the plate on the coffin.

William Scrimgeour, called and sworn for the People, among other things testified as follows: I am superintendent of interments at Greenwood Cemetery; by reference to my register, I recollect the burial of Mrs. Stephens on the twenty-fourth of September, 1857; the entry in the register is as follows: September 24th, 1857, the remains of Sophia Stephens were this day interred in lot number 9146; grave number 272; place of birth, Ireland; age, 46 years; married; late residence, 166 East Twenty-seventh street, New York; place of death, New York; time of death, September 23, 1857; disease, inflammation of the stomach; undertaker, John B. Cantrell; Michael Dalton is my assistant, and was there; when Professor Doremus came to remove some of the earth from the grave, I was present and saw the coffin, and the name and date correspond with what I have stated; when we disinterred the coffin the second time for the removal of some earth around it, the coffin was enclosed in a box; I did not see the coffin when it was disinterred by coroner Connery; last Monday I had the coffin taken up and delivered to John Haley.

Michael Dalton, called and sworn for the People, among other things testified as follows: I am employed at Greenwood Cemetery under charge of Mr. Scrimgeour; I received the corpse of Mrs. Stephens from him on the 24th of September, 1857, and interred it in lot 9146, grave 272; was present on the 23d of last September, when coroner Connery exhumed the body; the two Misses Bell were also there, and identified the body; the coffin containing the body was then put in a box, and taken away in a wagon by John Ward. The coffin was afterward re-interred, and subsequently again taken up, and some dirt from over and under the coffin taken away by a

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gentleman; I do not think the grave had been opened after the corpse was buried, previously to the exhumation of the body; I was around the ground all the while; the coffin was taken up for the last time on last Monday, and delivered to John Haley.

John Haley, called and sworn for the People, testified as follows: Last Monday I went with an order from the District Attorney to Greenwood Cemetery, and received a coffin from Michael Dalton, the last witness, which I took to No. 133 East Eighteenth street, and delivered it to the person in charge there.

Patrick Rielly, called and sworn for the People, among other things, testified as follows: I knew Mrs. Sophia Stephens, and saw her twice while she was sick, the last time on Monday or Tuesday next before her death; she was lying on her back in bed; each time she said she was burning inwardly; the last time I saw her there was a red hue on her face and it was bloated up.

Michael Flynn, called and sworn for the People, testified, among other things, as follows: I am a druggist at 142 Second avenue; I know the prisoner, and knew Mrs. Stephens in her lifetime; I sold the prisoner half an ounce of arsenic about five weeks before his wife died; and about a week previous to that sale, sold him half an ounce more; for about three years previous to the second purchase of arsenic, the prisoner used to come into the store two or three times a week, but during the five weeks that intervened between that purchase and her death, do not recollect of his being in my place once.

The envelop in which was enclosed the anonymous letter received by Mr. Cardwell, was then shown to the witness, who thereupon testified as follows:

The direction on that envelop is in my handwriting; I directed it by request of the prisoner, who came in one evening, and asked me to direct it for him, and I did so; this was about May or June last, in the commencement of summer; after I directed the envelop, I gave it to the prisoner, who took it away with him.

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The witness was not cross-examined.

Walter L. Sandford, called and sworn for the People, testified, among other things, as follows: I have visited the premises on the south side of East Twenty-seventh street, No. 166, formerly occupied by the prisoner; I also know the premises on the south side of East Twenty-sixth street, occupied by John Stephenson; the window at the head of the stairs in the premises, formerly occupied by the prisoner, could be seen very plainly through a narrow alleyway between the houses on the north side of East Twenty-sixth street from Stephenson's factory; I tested the matter by putting a piece of paper in that window, and then going round to Stephenson's factory and looking; I could easily see the paper.

John Ward, called and sworn for the People, among other things, testified as follows: I am an undertaker, and on the 23d of September last, went with coroner Connery to Greenwood Cemetery; the two Misses Bell, Robert Bell and another gentleman also went; when we got there a grave was opened, the coffin taken up and opened, and the body was recognized by the Misses Bell as that of their aunt; I then took it to the Bellevue Hospital, and they again recognized it; it was then put in the dead house at the hospital, and about the third of October the coffin and a part of the body were re-interred in the same grave.

The witness was not cross-examined.

Joanna Brandon, called and sworn for the People, among other things, testified as follows: I knew Mrs. Sophia Stephens in her lifetime, and saw her several times during her sickness; the first time was about two weeks previous to her death; she was then sitting up in the outer room, in a chair facing the window, and I saw distinctly that she had a very bad looking eye; it was black around it; did not see the discoloration at my subsequent visits; she was then in bed and her face was shaded; during my visits she appeared to be in great pain, and she complained of a burning sensation in her chest and throat, nausea and sickness of the stomach; she said it seemed as if she had a rolling ball of fire in her chest, and if she could put

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her hand down and pull it up she would be relieved; previous to her sickness, Mrs. Stephens appeared to be a healthy looking woman; I noticed her particularly, and she looked so to me.

Mary Pullman, called and sworn for the People, among other things, testified as follows: I knew Mrs. Stephens in her lifetime, and visited her twice during her sickness; she was very much distressed when I saw her, and said she was constantly sick in her stomach, and could keep no food upon it; the last time I was there was the evening before her death; I only went into the outer room and did not see her; Mrs. Stephens was sleeping so heavily, and breathing so hard, that I could hear her in the outer room, and I remarked to one of her nieces that she should not let her sleep so heavily long at a time, that a person so weak should be roused frequently.

Daniel R. Stuart, called and sworn for the People, among other things, testified as follows: I reside at 166 East Twenty-seventh street, and did when Mrs. Stephens died, on the floor next under that which the prisoner occupied; I lived there a year and a half before she died, and used to see her about every day; I always thought she was a pretty healthy woman; she went round barefooted, and I thought she was pretty healthy, or she would not do that; she died between two and three o'clock in the morning.

James R. Wood, called and sworn for the People, among other things, testified as follows: I am a physician; reside at No. 2 Irving place; I made a *post-mortem* examination of Mrs. Stephens in Bellevue Hospital, in presence of Dr. Doremus, Coroner Connery, and several others, on 24th September, 1858, about noon; found the body in a remarkable state of preservation; the face and scalp were in an advanced state of decomposition; the viscera were apparently healthy, and in an excellent state of preservation; the viscera were removed and handed to Dr. Doremus; I took the body from a coffin, upon the plate of which I found the following: "Sophia Stephens, died September 23d, 1857, aged 46." The skin was of a

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dirty yellow color; the internal lining of the intestines was in a remarkable state of preservation; the internal surfaces of the lower part of the large intestines, rectum, and portion of the descending colon were reddened; this was an indication of congestion or inflammation of some period prior to death; on examining the muscular tissues of the body, I found they had not lost their coloring matter; the mucous membrane of the stomach was shrunk and much harder than usual; there was an unusually small quantity of contents of the stomach; the bladder was much shrunk.

The witness being recalled at another stage of the trial, among other things, testified as follows: Arsenic may be taken into the stomach, and the person die, without any change taking place in the stomach; if arsenic was taken in large quantities, there might be vomiting, and death occur after many hours, and inflammation might be discovered in the stomach; there might be inflammation of the colon and rectum; ulceration and perforation of the stomach are very rare, as a consequence of arsenic; the kidneys are the chief eliminating organs of arsenic; and, from the irritating effects of the arsenic causing a flow of blood to them, might be congested, and suppression of urine follow; the brain rarely suffers, and generally the mind is clear and serene; arsenic has an effect upon the nervous system, as shown by great prostration, feeble action of the heart, and hence a feeble pulse, with a contracted hypochondriac countenance; death may occur from arsenic, and there be no morbid appearance of the body; some of the nervous effects are want of sensation, numbness and paralysis; sometimes there is an inflammation of the mouth and lips; there was no idea of subjecting the whole body to chemical examination until it was taken to the hospital by Dr. Doremus; I gave directions that no one should touch the body; Dr. Phelps had a key to the room, but it was not used, as I am informed by him; such a body could not be injected for anatomical preservation.

Robert Ogden Doremus, called and sworn for the People, among other things, testified as follows: I reside at No. 70

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Union place; am professor of chemistry in the New York Medical College, and in the College of Pharmacy, and Professor of Natural History in the Free Academy; on the 24th September, 1858, I was present with one of my assistants, Dr. Zenker, when Dr. Wood made a *post-mortem* examination of a female, after she had been recognized by the Misses Bell; the body was removed from a well preserved coffin, on which was "Sophia Stephens, died September 23d, 1857, aged 46 years;" I received from Dr. Wood the viscera, and placed them in new and clean glass jars; these were conveyed to my private laboratory, and afterward chemically investigated; arsenic was found; in several small parts of the liver and kidneys, varying from two to eight ounces, arsenic was discovered; the intestines were nearly empty, containing a thin film of a yellowish pasty substance, about one-half of a teaspoonful in quantity; I examined this chemically, and ascertained the presence of arsenic; seven pounds and three ounces of the viscera were examined, and yielded arsenic; I examined the muscular tissues, and discovered in it arsenic, also in the skin and bones; I estimate I discovered two grains of arsenic; there is a certain amount of loss in the processes, and I think there was from four to six grains of arsenic in the body; all the vessels and instruments used in this analysis were new; all the acids were thoroughly tested before being used, and all the chemicals of every kind were likewise; I analyzed the shroud, part of the coffin, part of the lining of the coffin, some of the nails and screws of the coffin, and three samples of the soil of the grave from which the body was taken, but detected no arsenic; arsenic, when taken into the system, is removed chiefly by the kidneys; it begins to be removed within twenty-four hours; arsenic is not a natural constituent of the human body; a fatal dose of white arsenic may be as small as one grain, $1\frac{1}{2}$, $1\frac{1}{4}$, $1\frac{1}{8}$, two grains, three grains, and four grains, as reported.

William Detmold, called and examined for plaintiffs, among other things, testified as follows: I reside at No. 103 Ninth street; am a physician and surgeon; symptoms of arsenical

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poisoning vary according to the quantity taken and the condition of the system; the most ordinary are vomiting, sometimes stained with blood, intense burning pain, generally in pit of stomach, but extending upward and downward; the belly tender to the touch; the pain as far down sometimes as the anus, and upward to the chest; at times making mouth sore; diarrhea will in a great number of cases exist, and after a while the discharge will be slightly tinged with blood; generally an exceedingly anxious countenance; frequently a sunken eye; in some cases a brilliant wild expression of the eye; excessive prostration; the pulse quick and feeble; limbs powerless; sometimes paralyzed, and loss of sensation; extremities numb; urine of a high color, scanty, and sometimes suppressed; the mind is free; in rare cases delirious; sometimes there are convulsions, even rigidity and a failing of the extremities; frequently there are illusions and visions.

Q. In a case in which such symptoms as will be detailed to you should occur, and after death such appearances of the body; and upon a chemical examination such a result as will be detailed, what, in your opinion, would be the cause?

Counsel for prosecution, at request of the prisoner's counsel, stating that the opinion of the witness was sought upon symptoms as follows: "Sickness of two weeks; appearance of redness before the eyes; dizziness and burning of the chest, felt as if a ball of fire were moving up and down in the stomach, continuing to increase until death; complaint of the burning being from bottom of chest and coming up to throat; vomiting through the course of the sickness; vomiting with great pain after eating and drinking; color of the vomited matter first yellow, continuing so for some days, then of a dark green color, getting darker and darker until death; vomited matter containing red spots, and appearance of little pieces of flesh on one side of the basin; mucus in vomited matter; pain in the pit of stomach, increased by pressure; extreme thirst, drinking all the while, and drinking everything cold; countenance

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changing, becoming very anxious, languid, careworn and fatigued; the eye sunken; piercing expression; eyes having a sharp look; she a great deal debilitated; weakness of the limbs; numbness of the hands; coldness of the legs and feet for a week before death; two or three days before death legs and feet were swollen and cold; clinching her hands and feeling for something all the while; anxiety to use hands and feet; having no power in her hands and arms; the whole side numb night before death; two or three days before death not answering questions readily; convulsed movements of the arms; constantly throwing her arms about the bed, catching hold of things; her lips swollen; one week before death suppression of urine, continuing until death, it being connected with pain; the discharge of *fæces* with great pain, and of a dark color of a very offensive kind, and mixed with blood; cold perspiration on her hands; drowsiness in the last part of sickness; great stupor and lassitude immediately preceding death; about two hours before death giving a horrid scream, and sinking away in exhaustion; growing weaker the longer she was sick."

Objected to by prisoner's counsel, on the ground that the prosecution had no right to ask a supposititious question.

Objection sustained by court, and question overruled.

Q. Of what are the following symptoms indicative?

Counsel for the prosecution going on to name to this witness such symptoms as had been stated by the witness before the jury in this case.

Objected to, and objection sustained.

Among other things, the witness further testified: The vomited matter, after the stomach was emptied of its contents, would be of a yellowish color, with spots and streaks of blood, and if there was a good deal of blood it might assume a darker color—it might be of the color of coffee grounds; restlessness is a frequent symptom; in most cases death occurs under collapse; cold, clammy skin, weak pulse, gradual sinking, at times come; the kidneys begin to remove the arsenic in from ten to twenty-four hours after being taken; arsenic is

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a preventive against putrefaction; I believe no matter how much arsenic is introduced into the stomach, only a moderate and limited amount will be absorbed, that is, will enter the blood; when a certain amount is reached, the patient will die; we may introduce as much as we please into the stomach, the system will not absorb it.

B. Fordyce Barker, called and sworn for the People, among other things, testified as follows: I reside at No. 70 Union place; am a physician; acute arsenical poisoning is where the effects are comparatively speedily produced; the symptoms are faintness, depression, nausea, vomiting, pain at the pit of the stomach, extending up to the throat, of a very burning character, and partially extending over the abdomen; another class of symptoms is due to the effects on the nervous system, viz., exhaustion, collapse, sometimes coma and death; frequently before death there is a loss of sensation, sometimes palsy, sometimes convulsions; in chronic poisoning the symptoms are local irritation, nausea, vomiting, gradually and more slowly developed; the pain in the stomach and throat still retains its burning character; partial paralysis is a frequent symptom; the matter vomited is frequently streaked with blood; the evacuations of the bowels resemble those of dysentery, painful and very frequent, burning heat and irritation at the extremity of the bowels; the stomach and abdomen are sensitive to pressure; a characteristic symptom is intense, urgent and constant thirst; the character of feces varies; sometimes they are with blood, and sometimes they are with mucus; sometimes thin, feculent and watery, of a dark color; the countenance becomes sunken, with an anxious expression; the pulse becomes feeble and rapid; the surface becomes cold and clammy, the patient restless and anxious, with loss of sensation, coma and death; the passage of urine and of the evacuations of the bowels are accompanied with pain; arsenical poison stimulates inflammation of the stomach or of the bowels, cholera or cholera morbus; the pain, in inflammation of the stomach, is accompanied with active fever; in poisoning, the pain is complained of in the track from the stomach to the throat, as a

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burning, while in inflammation of the stomach it is at the seat of pain; in inflammation of the stomach it is not followed by loss of sensibility, paralysis, or incessant vomiting; in cholera morbus the difference is, that the vomiting is not accompanied with a burning sensation in the stomach and throat, and is not followed by loss of sensation or paralysis; bilious colic can hardly be mistaken for arsenical poisoning; there is a constipation of the bowels, and it is not attended with vomiting; arsenic has a tendency to retard putrefaction; there have been cases of death from arsenic, when no arsenic has been found in the stomach or any of the tissues of the body; arsenic does not exist as a natural constituent of the human body; the existence after death in the body of a certain quantity of arsenic, is proof that a greater portion has been taken into the system; laudanum would not neutralize the effects of arsenic, but would mask the symptoms.

No cross-examination.

Benjamin W. McCready, called and sworn for the People, among other things, testified as follows: I reside at No. 8 Ninth street; am a physician; the symptoms of arsenical poisoning vary; commonly the effect begins within half an hour; the patient is seized with sickness, pain and vomiting; the burning is seated at the pit of the stomach; it may extend along the track of the gullet; the vomiting is incessant; there is intense thirst; after a time the bowels are acted upon; there is diarrhea as a rule, accompanied with a great deal of pressing and bearing down; there is often a frequent call to pass urine, it being diminished in quantity and sometimes suppressed; there is a great general depression; the patient becomes pale; countenance anxious; the pulse frequently feeble, and finally lost, and the eyes often reddened; the patient may die with these symptoms, or, in a very rare class of cases, may die simply from the nervous effects of the arsenic, by faintness—sometimes convulsions, sometimes coma, passing into a deep sleep which ends in death; these two classes of symptoms are often mixed, the irritant and nervous effect being mingled; sometimes you have palsy, loss of feeling in some of the limbs,

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convulsions, in few cases delirium; the mind is commonly clear; the vomit is covered with yellow or green bile; the bile may be still darker, and it may be streaked with mucus and blood in specks; the pain in the stomach is increased by pressure; the prostration is very great; the discharges from the bowels may be streaked with blood; if, after a poisonous dose of arsenic has begun to take effect, laudanum were administered, it is exceedingly probable that it would take a very much larger dose of laudanum to produce the usual effect upon the system than it does ordinarily; whenever there is a very acute pain, violent vomiting and purging, and in certain diseases of the nervous system, large doses of opium may be borne; arsenic is not a natural constituent of the human body; if I found two grains in a body, I would feel morally certain that a much larger dose had been given.

Alanson Jones, called and sworn for the People, among other things, testified as follows: I reside at 42 University place; I am a physician; the common symptoms of arsenical poisoning are, that within two or three hours after the administration of the poison, great faintness comes on, then pain in the pit of the stomach, described commonly by patients as being like fire, nausea, constant vomiting, intense thirst; the pain being at the pit of the stomach, extends itself all over the belly; diarrhea then ensues, the purging is constant and violent, with a great strain and effort, in my experience; the discharges have been very offensive, and sometimes streaked with blood; generally there are streaks of blood in the vomited matter; death is usually preceded by collapse, and utter cessation of the vital powers, coldness, small pulse; usually there are cramps, spasms and paralysis in some portions of the extremities, and numbness; the disease most nearly resembling arsenical poisoning is Asiatic cholera; in cholera, however, the vomited matter does not contain blood; there is usually no great straining; the discharges are not offensive, and not streaked with blood; there is not great tenderness to the touch upon the abdomen in cholera, as there is in arsenical poisoning; under ordinary cir-

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cumstances, the average quantity of arsenic necessary to cause death would be three grains, but there are cases upon record where much smaller quantities have caused death.

Edward Downes Connery, called and sworn for the People, among other things, testified as follows: I am a physician; have been coroner of the city of New York; I held the inquest on the body of Mrs. Sophia Stephens; I first saw it in Greenwood Cemetery; upon the order of the District Attorney and Justice Welch, I went to Greenwood with the Misses Bell and others, and Mr. Ward, an undertaker; I employed a person to dig the earth, after having procured the number of the grave; on coming to the coffin, I ordered the inscription on the coffin-plate to be read; I asked the Misses Bell if it were correct; they said yes; the coffin was opened; the Misses Bell identified the body of Mrs. Stephens; the coffin was placed in a hearse and brought over to Bellevue Hospital, and put in charge of Dr. Wood, Mr. Daily and others; the Misses Bell then again identified the body of their aunt; on the occasion of making the *post-mortem* examination of the body by Dr. Wood, I was present and saw the body; it was again identified by the Misses Bell.

Ann Fee, called and sworn for the People, among other things, testified as follows: I am the wife of John Fee; knew Mrs. Stephens over seven years; before she was taken sick she visited me, and sat in my room about six feet from the window; I noticed that she had a black eye; that day she complained of a pain in her chest; afterwards she called to see me again, and said she must go home to see the doctor; she said, "What do you think James has been doing? he has been sending Dr. Cadmus to see me."

Catharine Meehan, called and sworn for the People, among other things, testified as follows: I knew Mrs. Stephens, and called to see her ten days before she died; she told me she was afraid she would not recover, for her throwing up was not natural; she then handed me the basin she used, and said, look at that; it looked yellowish and blackish.

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The witness being *cross-examined*, among other things, testified as follows: I always knew the prisoner and his wife to live happy as I knew them, and comfortable.

The witness being further examined for the People, testified as follows: I have no knowledge as to how they lived, except what I have heard.

Maria Foley, called and sworn for the People, among other things, testified as follows: I knew Mrs. Stephens, and visited her during her sickness; one afternoon I was there and saw her little daughter, Bella, sick and vomiting; Mrs. Lucina Stephens was with me.

Lucina Stephens, called and sworn for the People, among other things, testified as follows: I knew Mrs. Sophia Stephens, and called to see her with Mrs. Foley; Mrs. Sophia Stephens was sick in bed, and her little girl was sick and vomiting.

John O'Brien, called and sworn for the People, among other things, testified as follows: I am keeper of the dead house at Bellevue Hospital, and was there when the body of Mrs. Stephens was brought there; my assistant, John Sweeny, was also there; Dr. Wood and Coroner Connery were also there; Sweeny and John Ward, who drove the hearse, carried the body into the house; the coffin was opened, and the Misses Bell looked at the body; the body was then locked up that night in the city dead room, and no one had access to it; I refused to let anybody see it; the next morning it was carried by Sweeny, another man and myself, up stairs to the pathological room, where the *post-mortem* examination was made; I did not allow any person to see the body previously; Dr. Wood and coroner Connery were there when the body was taken up; I was not present all the time when Dr. Wood was there; Dr. Doremus was also there, and took some parts of the body away in glass jars; the rest of the body remained on the table where the *post-mortem* examination was made; I kept the key, and when I was not there Sweeny had it; there was another door to the room, and Dr. Phelps kept the key to that; one Sunday I was away, and when I returned Sweeny told me Dr. Doremus had taken the body away; while it was there I

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did not allow any person to go in and see it unless I was with them ; I did not allow any person to touch it or interfere with it in any manner, except Drs. Wood or Doremus, or persons in their company.

John Sweeny, called and sworn for the People, among other things, testified as follows: I am employed at the Bellevue Hospital, and help John O'Brien ; he kept the key of the room, except when he was absent, which was very seldom ; when he was, I kept the key, and did not allow any person whatever to go in to see the body.

Robert Bell, called and sworn for the People, among other things, testified as follows: I am a brother of Sophia and Fanny Bell ; I was present when they recognized the body of our deceased aunt, Mrs. Stephens ; I also recognized the body ; I never interfered with the body in any manner, except that once in the presence of Dr. Wood, who was showing some gentlemen how hard the body was, I put my finger on it to try the solidity of the flesh ; the internal portion of the body had previously been taken away by Dr. Doremus.

John Fee, called and sworn for the People, among other things, testified as follows : I met the prisoner four or five days before his wife died, and he said that she was very poorly ; after that he said he thought she was getting better ; I was at his house on the morning of the day that the mother of Mr. John Stephenson was buried and saw the prisoner's wife ; she did not have a black eye ; I looked at her, and would have noticed it if her eye was injured.

Adam Zenker, called and sworn for the People, among other things, testified as follows : I reside at 433 Houston street ; am a physician ; went with Dr. Doremus to Bellevue Hospital in this case ; saw Dr. Wood make the *post-mortem* examination of Mrs. Stephens' body ; Dr. Wood cut out and gave to me and Dr. Doremus, part of the liver, part of the lungs, the stomach, fastened in both orifices, the small and large intestines, colon and rectum, pancreas, bladder and uterus, spleen, gall-bladder and part of the brain ; we placed them in clean and new glass jars, covered with oil silk ; I assisted Dr. Doremus in analyz-

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ing these viscera; we discovered arsenic; we produced metallic arsenic from them; all the acids used on this analysis were tested for hours, and all the salts, &c.

Bern. L. Budd, called and sworn for the People, among other things, testified as follows: I live at 148 East Thirteenth street; am a physician, and have pursued the study of toxicological chemistry especially; I opened the intestines of Mrs. Stephens' body; we removed from them about half a teaspoonful of substance; on 3d October went with Dr. Doremus to Bellevue Hospital; found the body said to be Mrs. Stephens' lying in the Pathological Museum on a table; assisted in removing it to the New York Medical College; assisted them in removing the soft parts from the bones; some muscular tissue remained upon the bones, which was afterwards removed by me from the spinous processes and under the shoulder blade; I assisted in the analysis of this last at a laboratory hired for this purpose by Dr. Doremus; all the acids and material used in this analysis were there prepared, to insure their purity; the vessels employed were new; the laboratory was sealed always upon leaving, and the seal examined and found unbroken on entering; metallic arsenic was discovered by this analysis; we also analyzed with similar precaution the skin and bones of the body of Mrs. Stephens, at the laboratory in Eighteenth street; metallic arsenic was also found in them; arsenic is not a natural constituent of the human body; I have looked into the subject of arsenic eating; Christison, Taylor, Pereira, and Wharton and Stille discredit it; I received from Mr. John Haley, at 113 East Eighteenth street, a coffin, portions of which were afterwards analyzed; I have the plate of that coffin. (Witness here produced a coffin plate, and read: "Sophia Stephens, died September 23, 1857, aged 46 years.")

Charles Phelps, called and sworn for the People, testified as follows: I am a surgeon at the Bellevue Hospital; when the body of Mrs. Sophia Stephens was at the dead house, I had a key to the room in which it was kept; I did not allow any person to use the key, nor did I do anything to the body.

The prosecution here rested.

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Isabella Jane Stephens (child of the prisoner, examined for the defence), called and examined by the court as to her understanding of the nature of an oath :

Q. How old are you? A. Seven years. Q. Do you know what is meant by taking an oath? A. Yes, sir. Q. Do you go to Sunday school? A. Yes. Q. How many years have you gone? A. I do not recollect. Q. Did you go to Sunday school last winter? A. Yes, sir. Q. And the winter before that? A. Yes. Q. Suppose you were to swear here, and tell an untruth, what would become of you? A. I would go to hell fire. Q. Who told you that? A. My father. Q. When did your father tell you that? A. I do not remember. Q. Do you know your catechism? A. Yes. Q. What Sunday school did you go to? A. Twenty-seventh street Sunday school. Q. What catechism have you learned? A. The first and second.

Court. If the prisoner wishes it, I am disposed to allow the witness to be examined, and let her testimony be taken for what it is worth.

The witness was then sworn and examined for the prisoner, and testified, among other things, as follows: I saw Fanny Bell give my mother medicine; I saw her give powders; she got them out of the clock; she gave her powders twice; she gave them out of a tablespoon; I was sick; it was while my mother was sick in bed; I was made so by eating flummery; it was made by Fanny Bell; it was on a Tuesday; cousin Fanny Bell gave it to me; Fanny Bell was not sick that day; she was sick on Friday; it was cold cabbage made her sick; Fanny Bell called my mother a liar; she also tried to hit my mother with a bench.

The witness being *cross-examined*, among other things, testified as follows: My cousin, Isabella Bennett, told me that I was made sick by eating flummery, and my cousin Fanny Bell by eating cold cabbage; she also told me she called my mother a liar, and tried to hit her with a bench; that is the way I know these things; I told them to Mr. Ashmead, at his house, last Sunday; I know Fanny Bell gave my mother powders,

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because she took them out of the clock; I did not see my mother take them.

The *direct examination* being resumed, she was asked:

"Who used to go errands when your mother was sick? any of them?"

The counsel for the prosecution objected to the question, but it was allowed by the court.

When the counsel for the prisoner refused to put it to the witness, whereupon it was put by the court, and the witness answered as follows:

"Sometimes my cousin; sometimes myself."

Susan Hannah, called and sworn for the defence, testified, among other things, as follows: I am the wife of James Hannah, and sister to the prisoner; I called to see Mrs. Stephens every day during her last sickness; prior to that time her ankles used to swell a good deal; they were swelled sometimes, and then the swelling would go away; two years before her death, Mrs. Stephens had an attack of heaving off her stomach, and she was always subject to such attacks; my husband purchased arsenic of Michael Flynn, at Dr. Cadmus' store; Flynn was a clerk there; the prisoner was with him; I waited on the sidewalk until they came out; it was in the month of July, next before Mrs. Stephens died; he got three cents' worth; he took it home to our house, and mixed it there for rats; he afterwards brought home three cents' worth more.

The witness being *cross-examined*, among other things, testified as follows: At the time my husband first purchased arsenic we were living in Clark's house, corner of avenue A and Twenty-third street, next the East river, on the right hand as you go down Twenty-third street; after we returned home my husband sprinkled the arsenic in an old broken plate, with some potatoes, or something else; we lived on the fourth floor; I used to put things in the cellar, and the rats would seize them; my husband put the arsenic in the cellar, where we kept our butter and cheese; we bought butter and cheese in quantities at Washington market; each family had their own cellar partitioned off with boards; our cellar was locked; I

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locked it myself, when he put the arsenic in ; I did not see much of the rats after the poison was mixed and left in the cellar ; I was sworn and examined as a witness before the coroner's jury ; I did not there testify as follows : " When I went there I used to go occasionally into the sick room ;" I did not there testify " that Mrs. Stephens' nieces were always in the sick room ;" I did not there testify " that Fanny Bell was the principal attendant upon Mrs. Stephens ;" I did not there testify as follows : " She expressed a desire to take no more medicine ;" I did not there testify " that I did not get so close to her as to find out whether it was laudanum or not ;" I did not there testify " that Mrs. Stephens died about half-past two o'clock in the morning ;" I did not there testify " that I was in the house the day before Mrs. Stephens died until about six o'clock in the evening ;" I did not there testify as follows : " I returned at eight o'clock, and remained until she died ;" I did not there testify as follows : " I gave her drinks, lager beer, ice water," &c., nor did I think of it ; I did not there testify as follows : " My brother gave nothing to Mrs. Stephens the day before she died but milk and water ;" I did not there testify as follows : " All the matter vomited by Mrs. Stephens was yellow, green and other colors," not to my recollection.

The witness further testified as follows : the coroner would only hear me speak what he asked me ; I would not be let speak anything else.

Isabella Bennett, called and sworn for the defence, among other things, testified as follows : I am daughter of James and Susan Hannah ; I was not married when my aunt died ; I have since been married to John Bennett, about four months since ; my aunt, Mrs. Stephens, was confined to her bed about two weeks before her death ; I went there on Tuesday, and remained one week, until the Tuesday that she died ; I was there all the time that week, and stayed there at night ; my aunt sent for me to go of errands, and do things for her ; I was there until four o'clock of Tuesday ; I saw Fanny Bell give my aunt one powder ; it was three or four days before her death.

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The witness was here examined particularly as to the symptoms of Mrs. Stephens' last illness.

I know William Knox ; I went to the prisoner's house one evening.

Q. Did you ever see him in, or on or about the bed where the Bell girls were ?

The counsel for the prosecution objected to any testimony in relation to Knox and the Misses Bell, except as to the occurrence proven on the part of the People.

The court said that it would allow the evidence ; but if the defence proved other transactions, the prosecution would be allowed to call witnesses as to such matters.

The witness then testified as follows : I went to the prisoner's house one evening, about five months after the death of my aunt ; I went to church with Fanny Bell, and when we came back William Knox was there ; he remained until we were going to bed ; I saw Fanny and Sophia undress themselves and go to bed ; they left me sitting in the rocking-chair in the sitting room ; my uncle and his little girl were in bed in his own room ; I saw William Knox take off his boots in the sitting room, and go into the bedroom where Fanny and Sophia Bell were in bed, and get over right near the wall where Fanny was sleeping, right next to Fanny ; then my uncle spoke out of his bed, and asked me why I did not go to bed ; I asked him where would I go ; he said come and sleep with me and Bella, and I did so ; when I got up in the morning William Knox had gone away ; at another time, while Knox was boarding there, I went over one evening to the prisoner's house ; while William Knox and the prisoner were out, I went and got under their bed ; I remained there until after they went to bed ; after they were in bed about an hour, William Knox jumped out of bed where he was lying, and ran into the girls' bedroom, and went to bed there ; he was undressed ; Sophia then got out of the bed, leaving Knox and Fanny there in bed ; then Sophia came and got into my uncle's bed ; Sophia remained there about twenty minutes or half an hour, when Knox came back into my uncle's bed, and Sophia went

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out; I was under my uncle's bed all the time; my uncle was undressed the night I slept with him.

The witness being *cross-examined*, testified, among other things, as follows: I was sworn and examined before the coroner's jury; I did not then testify on the subject of scouring the floor after Mrs. Stephens' death; I cannot remember whether or not I testified before the coroner's jury as follows: "I was in and out of the house while Mrs. Stephens was sick;" I do not remember whether I there testified as follows: "My mother gave my aunt a drink;" I do not remember whether I there testified or not as follows: "I saw my uncle give my aunt a drink;" I cannot answer your question whether I there testified as follows: "My aunt used to throw up a few minutes after drinking."

The signature, "Isabella Hannah," to deposition of coroner's inquest, is here shown to the witness, whereupon the witness testified as follows: I wrote my name at the coroner's jury; I cannot say whether that signature is mine or not; I have examined, and cannot say whether it is or not; I was at home part of the time when my parents resided at avenue A, corner of Twenty-third street, in Clark's house; the families in the house had butter and such things in the cellar in the warm time of the year; I have seen my mother have butter there; I have also seen a lady by the name of Kirk, who lived on the floor under us, have butter in that cellar; she has gone to some part of the country, but I do not know where.

Maria Hannah, called and sworn for the defence, among other things, testified as follows: I am the daughter of James and Susan Hannah, and niece of the prisoner; During Mrs. Stephens' last sickness, I was at her house occasionally, twice, and sometimes three times a day; the last time was on the night of her death; I was there in the morning, afternoon and evening of that day; also the afternoon and evening; Friday in the morning and afternoon, Thursday morning and afternoon; Wednesday not all, and on Tuesday, a week before her death, in the afternoon and evening; my sister, Isabella Bennett, remained there from that Tuesday until the evening of

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my aunt's death; since I first knew my aunt, I have known her to be subject to throwing off, even when she was apparently in health; on the Monday before my aunt's death, I saw Fanny Bell give my aunt a powder. (The witness here described particularly the symptoms of Mrs. Stephens' last illness.) I know William Knox; about two months before the Misses Bell left the prisoner's house, I went over there one Sunday morning, between six and seven o'clock, and saw William Knox and Fanny Bell sleeping together in her bed; Sophia was sitting in the rocking chair, asleep, with her shawl around her; I waited there for breakfast; William Knox went away as soon as he got dressed; at the table my uncle said they must stop such conduct, or leave his house; in July or August, 1857, my father had arsenic at his house to kill rats; he put it in the cellar; we used to keep butter, cheese and cold meat there.

The witness being *cross-examined*, testified, among other things, as follows: I was sworn and examined as a witness before the coroner's jury.

The signature, "Maria Hannah," to deposition on coroner's inquest, is here shown to the witness, whereupon the witness says: I don't know whether that is my signature; I will not swear to my handwriting; I will not say that it is not my signature; I do not remember that I there testified as follows: "For three weeks previous to Mrs. Stephens' death, I called there every other day;" I did not there testify as follows: "She departed at about ten minutes past two the following morning;" I do not remember that I there testified as follows: "I did not see her get any medicine or drink during this time;" I did not there testify as follows: "I saw my mother wet Mrs. Stephens' lips once with water; I did not see anybody else apply anything else to her lips;" I did not there testify as follows: "Half an hour previous to my aunt's death, my uncle threw himself on the bed in the next room;" at the coroner's inquest, coroner Connery would not allow me to speak one word; he did not tell me to tell all that I knew concerning the sickness and death of my aunt; my parents kept butter, cheese and meat in the cellar of Clark's house, all the

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while for two or three months; Mrs. Kirk also kept food in that cellar; she has moved into the country, but I do not know where she is; a gentleman who boarded with her told she had moved, but I cannot tell how long since he told me.

Catharine Stewart, called and sworn for the defence, testified, among other things, as follows: "I reside at No. 166 East Twenty-seventh street; my husband's name is Daniel Stewart; I visited Mrs. Stephens during her last sickness, two or three times; she said she had a burning in her stomach and a throwing off; I do not know of her being sick at that time, only she felt bad and weak when she went up stairs.

The witness being *cross-examined*, testified, among other things, as follows: I saw the prisoner give his wife a drink; I think it was the day before she died; it might have been two days; it was the color of coffee or brandy; I thought it was the one or the other; she got out of bed as soon as she drank it, and threw it up.

George Davis, called and sworn for the defence, testified, among other things, as follows: I reside at No. 451 Second avenue; am a book-keeper; I am a class leader in the Twenty-seventh street Methodist Church, of which I understood the prisoner and wife were members; I visited Mrs. Stephens from six to a dozen times during her last illness. (The witness was here examined in relation to the symptoms of Mrs. Stephens' sickness, especially on the last night.) During Mrs. Stephens' illness, I did not consider Fanny Bell attentive to her; it seemed to me that she was neglected by the Misses Bell.

Being *cross-examined*, the witness, among other things, testified as follows: I do not remember seeing any bottles or phials standing around the night Mrs. Stephens died; I was sworn and examined before the coroner's jury; the signature "George Davis," is mine; I cannot swear now whether or not I testified before the coroner's jury as follows: "I believe I saw some phials standing upon the washstand or table;" coroner Connerly would not let me testify to anything but just what he pleased; he would only allow me to answer the questions he put to me; my testimony was read over to me after my exami-

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nation ; the coroner would not allow me to say anything, except what would convict Stephens; he prevented me several times from saying what I wanted to say ; he several times told me to stop, and answer the questions he asked me ; I requested the jury to allow me to state the circumstances, and they did.

James Hannah, called and sworn for the defence, testified, among other things, as follows: I am brother-in-law of the prisoner; the health of Mrs. Stephens was always bad after she had her baby ; when she first came to this country, she always complained of a soreness of the chest and a swelling in her limbs, and also to a throwing off all the time occasionally ; the first time I saw her throw off was fourteen years ago, and she was subject to it up to her death ; I was to see Mrs. Stephens the Sunday previous to her death ; I was there twice that day ; I left at four o'clock, and did not see her again until she was dead ; she then shook hands with me, and said : "God be with you, James;" I was also there every evening for the two weeks before that Sunday, except the previous Sunday, when I was there in the day time ; I saw Fanny Bell give medicine to Mrs. Stephens ; she told me it was medicine ; I saw her give it to Mrs. Stephens out of a teacup ; on Sunday morning I went there and the prisoner was asleep, and I saw Fanny mix a powder and give it to Mrs. Stephens ; I saw her give Mrs. Stephens powders twice ; after she took these medicines she vomited, perhaps half an hour afterwards ; perhaps not more than twenty minutes ; I did not see the prisoner give her any medicine ; every time I went there, Mrs. Stephens threw up ; I purchased arsenic at Dr. Cadmus' store in July, 1857 ; I got three cents' worth ; I think I gave him a ten cent piece, and I did not count the coppers ; I think I got it of a man named Flynn ; Stephens went in and told him that he wanted it to poison rats, and Flynn helped him to arsenic ; I put it in my pocket and paid for it ; my wife was outside on the sidewalk ; that night I mixed the arsenic with cold potatoes on a plate, and put it down the cellar ; I afterwards got three cents' worth more from Flynn in August, 1857.

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The witness being *cross-examined*, among other things, testified as follows: I first heard of Mrs. Stephens' sickness in the afternoon of the first day that Dr. Cadmus visited her; I heard it from my wife; I went to the house a few days after Dr. Cadmus made his second visit; I went every evening the last two weeks of her sickness up to the Sunday before her death; I cannot tell the day of the week I made my first visit; I saw the Bell girls there when I made my first visit; the prisoner was there; Mrs. Stephens was sitting in an arm-chair, and the child, Bella, was on her knee; the next time I saw the Bell girls there, and the sick woman with her child; I went to see Mrs. Stephens two Sundays, and I think I saw her twice on each Sunday; when I went in the evening, perhaps it might be seven o'clock when I went; I went over as soon as I took supper; I might stay there an hour or an hour and a half; sometimes an hour, and sometimes not; on Sunday I went between eight and nine o'clock; usually stayed an hour or so; then I went home, or perhaps I went to church; I never saw Mrs. Stephens alive after four o'clock of the afternoon of the Sunday previous to her death; when I left she told me she was no better; the reason that I did not visit her the last two days was because I worked over-time then; I did not get home till between eight and nine o'clock in the evening, and I did not go over after that; I did not work any over-time during the two previous weeks; I work for Mr. Peckham, Twenty-third street, between the First and Second avenues.

John Pullman, sworn for defence:

Q. What was the conduct of these girls towards their aunt during her sickness, so far as you observed?

District Attorney asked that the witness be first interrogated as to what he knew about the matter.

Court—What opportunity had you of observing the conduct of the two Misses Bell towards their aunt upon the occasion of her illness? *A.* The opportunities I possessed of noticing their conduct, was being in that place during her illness several times; I know I was there twice; I suppose I was in four or five times. *Q.* What was the conduct of the Misses

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Bell towards their aunt? *A.* As far as I observed it, sir, it was unkind. *Q.* What was the conduct of Sophia Bell toward the defendant? *A.* How long do you want to cover with that question? As long as you please.

District Attorney objected, that the question should be confined to the time of her sickness.

Court—The question must be confined to the period of the last illness of deceased.

Defendant's counsel took an exception.

Q. How often during, say two years prior to the death of Mrs. Stephens, up to the time the girls left the house, did you see Sophia Bell and Stephens together? *A.* Times without number, sir.

District Attorney objected that this question and answer covered two years before Mrs. Stephens' death.

Court—I allow the objection taken by the prosecuting officer to any inquiry as to the conduct of these girls at a period anterior to the last illness of the deceased.

Defendant's counsel took exception.

Question and answer stricken out by order of the court.

Q. From your observation, was Sophia Bell more anxious to see Mr. Stephens than Mr. Stephens to see Sophia Bell?

Mr. Shaffer objected. The question was ruled out, and the defendant's counsel then and there took exception to the above ruling.

The court said, that while he overruled the question in the present form, yet the defendant would have a right to go into that point as to the probabilities of the prisoner having been actuated by a certain passion towards one of these nieces, or as to the probability of her having been actuated by a similar passion for him.

Q. What was the conduct of Sophia Bell towards the defendant for two years antecedent to the death of his wife, and up to the time when Sophia Bell left the house?

Court—The proper question is: What acts or expressions of hers did you observe towards the prisoner?

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A. I observed her very much going after him—I mean Sophia Bell—was in the habit of loitering about the church, watching Mr. Stephens in the lobbies and doorway.

Q. What was the general conduct of Sophia Bell in respect to Stephens? Was it of a modest, retiring girl, or a bold, forward, impudent one?

Objected to. Excluded. Exception taken by defendant's counsel.

The witness being *cross-examined*, further testified, among other things, as follows: I knew of the prisoner's getting up and going out of church to see Sophia Bell as many as thirty times within the two years previous to the death of Mrs. Stephens; I do not know how long he stayed out; I do not know what times of the day they were.

Subsequently, and before the defence closed their case, the District Attorney directed the witness, John Pullman to be called, and he answered to his name, and the District Attorney then offered that every question which had been propounded by the defence to John Pullman, but which had been excluded by the court, might now be put to the witness and answered by him.

To this offer the counsel for the defence made no response.

Richard Stephens was called as a witness for the defence, and sworn, examined and cross-examined, but was not interrogated in relation to an alleged conversation with Michael Flynn in relation to the sale of arsenic to Stephens.

John Stephenson, called and sworn for the defence, testified, among other things, as follows: I attend the Twenty-seventh street Methodist Church; the prisoner was in my employ since 1849, up to the time of his arrest; I know nothing against him, except latterly there appeared to be an undue intimacy between Sophia Bell and him; Stephens and Sophia Bell went in and out of the church together at irregular hours; it was also a common occurrence for her to come into the Sunday school and take a seat on the male side, in close proximity to Stephens; she was also a member of the choir of which I am

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leader; I have seen certain signals or telegraphs pass between her and him in church.

The witness being *cross-examined* for the People, further testified, among other things, as follows: I have seen Stephens talk with Sophia Bell in Sunday school; he taught a class, and it interfered with his teaching; I am superintendent of the Sunday school, but I did not speak to him on the subject; when passing telegraphs or signals to Stephens, I saw smiles or contortions upon Sophia Bell's face; they were more than smiles; they were smirks; I mean by smirking, a sort of smile, and an arrangement of the features by which to produce signals.

Dr. Finnell, sworn for the defence: The witness having testified on his direct examination, in relation to the symptoms of arsenical poisoning, and being cross-examined by the counsel for the prosecution, the following question was put to him:

Are these symptoms of arsenical poisoning—Appearance of red spots before the eyes; dizziness and burning in the chest; feeling as if a ball of fire were moving up and down in the stomach, continuing to increase until death; complaint of the burning being from bottom of chest, and coming up to the throat; vomiting through the course of the sickness; vomiting with great pain after eating and drinking; color of the vomited matter first yellow, continuing so for some days, then of a dark green color, getting darker and darker till death; vomited matter containing red spots, and appearances of little pieces of flesh on side of basin; mucus in vomited matter; pain in pit of the stomach, increased by pressure; extreme thirst, and drinking all the while; drinking everything cold; countenance changing, becoming very anxious, languid, careworn and fatigued; eyes sunk, and piercing expression; eyes having a sharp look; she a great deal debilitated; weakness of the limbs; numbness of the hands; coldness of the legs and feet for a week before death; two or three days before death legs and feet were swollen and cold; clenching her hands, and feeling for something all the while; inability to use hands and arms;

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whole side numb the night before death; two or three days before death not answering questions readily; convulsive movements of the arms; constantly throwing her arms about the bed, catching hold of things; her lips swollen; one week before death suppression of the urine, continuing until death, it being connected with pain; the discharge of *fæces* connected with great pain, and of a dark color, of a very offensive kind, with blood; cold perspiration on her hands; drowsiness in the last part of sickness; great stupor and lassitude immediately preceding death; about two hours before death giving a horrid scream, and sinking away in exhaustion; growing weaker the longer she was sick. Are these the symptoms of arsenical poisoning?

Objected to. Overruled. Exception taken by defendant's counsel.

A. Yes.

Defendant's counsel offered in evidence the whole of the papers taken before Justice Welch, in the case of the People, on complaint of Fanny Bell, against James Stephens, for the offence of poisoning his wife, and the binding over, which contained all the affidavits, and all the other papers taken before the police justices.

The counsel for the defence did not state the object or purpose for which they offered the said papers in evidence, nor specify any particular parts that they proposed to read, nor had the attention of the parties making the depositions before the justice, been called to them on the trial.

Objected to by the prosecution.

Court—I exclude them on the ground that, being objected to, they are not strictly legal evidence.

To which ruling of the court the defendant did then and there except.

Defendant's counsel also offered all the papers which were before the coroner's inquest, now in court.

Court—Such part or parts as the attention of witnesses has been called to, in their examination on this trial, may be read by the defence, and the rest is rejected.

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To which ruling of the court the defendant's counsel excepted.

Defendant's counsel now offered to read from the evidence of Doctor Doremus, Doctor Wood, and the two Bell girls, such portions as they deemed fit, without specifying what portions they so deemed fit.

Objected to by the prosecution. Objection sustained.

To which ruling of the court the defendant excepted.

Defendant's counsel now offered to read as evidence to this jury the affidavits made by Fanny Bell and Sophia Bell, which were made for the arrest of Stephens, and which were used before Justice Welsh, the signature of the ladies being admitted genuine by counsel for the prosecution.

Objected to by the prosecution.

Court—Was their attention called to them?

Defendant's counsel—No.

Counsel for the prosecution said that the defendant's counsel asked the witness Sophia Bell whether she had not stated in her affidavit that Stephens administered a powder, and she replied that she had, and that she believed it to be true.

The Court—I will allow any portion to which the attention of any witness has been called, but I reject all the rest.

To which ruling of the court defendant's counsel excepted.

The defence here rested.

William Knox, called and sworn in rebuttal by the People:

Defendant's counsel objected to the examination of this witness, as they had called upon the prosecution to call him before they closed their case, and they then neglected to do so. Objection overruled, and exception taken by defendant's counsel.

The witness testified, among other things, as follows:

Q. Do you know Sophia and Fanny Bell? A. Yes. Q. Are you related in any way to the Misses Bell? A. Yes, they are my cousins. Q. Did you ever sleep in the same bedroom with either of these two ladies? A. Yes. Q. Were you ever in or upon the bed with Miss Sophia Bell or Fanny Bell, or both of them, or either of them, at any time? A. I was upon the bed with both of them. Q. How many times were you on the bed with

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both of them? A. Once. Q. About when was it? A. I cannot remember the date. Q. Was it before or after Mrs. Stephens' death? A. After Mrs. Stephens' death. Q. Upon what occasion? A. I went up there on a visit. Q. Tell us what took place. A. I was going to bed to sleep with the prisoner, Mr. Stephens, and he told me to go and sleep with the girls?. Q. Did he say why? A. He said there was more room. Q. Tell us what took place. A. I went in; I lay down upon the outside of the bed; the girls objected, and said I should not do it, and I said I should do it; I laid across the foot of the bed. Q. What part of the clothing that you had on when you went to that house was removed during the time you were on the bed? A. My coat and hat, and no other part. Q. Did you remove your boots and shoes? A. No. Q. Were you at any time ever inside of a bed with Sophia Bell and Fanny Bell, or either of them? A. No.

The witness further testified as follows: I never got out of the bed where the prisoner was, and got into a bed with Fanny and Sophia Bell, or either of them; I remember hearing at one time, when I got up in the morning, that Isabella Bennett was under the bed in which the prisoner and I slept; I slept with him all the night, and did not get out of the bed at any time; Maria Hannah never came to the prisoner's house on a Sunday morning, or at any other time, and found me in bed with Fanny Bell or Sophia Bell, or either of them.

Mrs. Jane Harvey, called and sworn on part of the People in rebuttal.

Defendant's counsel asked what the prosecution desired to prove.

The prosecution replied that they proposed to show that no provisions were kept in the cellar of Clark's house, by Mrs. Hannah, as stated by her, Isabella and Maria Hannah.

Exception taken upon the ground that Mrs. Hannah, Isabella and Maria Hannah had been examined by the prosecution on this point; the defence asking no questions whatever in relation to these matters; and that the matter being collâteral, and the prosecution having made these witnesses their own

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upon these matters, they cannot seek to impeach them afterwards on these points by other witnesses.

Objection overruled. Exception taken by defendant's counsel.

In 1857 I resided in Twenty-third street and Avenue A, in the house of John Clark; I moved there the 1st of May, 1857; I remained in that house until the first of October; the family of the Hannahs were in that house when I was there; they were on the top of the house, on the same floor with myself, the fourth story; I did not know Mrs. Stephens, the deceased, intimately; I was introduced to her by Mrs. Hannah; I saw her there twice; I saw her there last about three or four weeks before her death; I was conversing with Mrs. Hannah at the time; what about I cannot say; I lived in that house from the 1st of May, 1857, to the 1st of October, 1857; I know of no provisions being kept in the cellar, and of no arsenic being there; I never heard anything about it; I have been there; it was fit for no person to go into, for the water was there and came into it, and you could not keep your wood and coal there, for it would keep it wet all the while.

Q. Do you know what quantity of provisions the Hannah family had at any time on these premises, while you lived there?

Objected to. Objection overruled, and exception taken by defendant's counsel.

A. I never knew them having anything in the cellar.

Q. State all you know upon the subject.

Objected to. Question allowed. Exception taken by defendant.

A. One thing I will say, that they were in the habit of borrowing almost every little thing that I could mention; I never saw them bring provisions in any quantity at all; a large quantity was a quarter of a pound of butter. Q. Where did they get their provisions? A. I cannot say where they bought their provisions; they got many things from myself.

No cross-examination.

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Michael Thornton, sworn, examined by the District Attorney on the part of the People, rebutting :

Q. Do you remember the coroner's inquest upon the body of Sophia Stephens in the fall of the year 1858? *A.* Yes. *Q.* Were you present? *A.* Yes. *Q.* In what capacity were you present?

Objected to by defendant's counsel as immaterial. Objection overruled. Exception taken by defendant's counsel.

A. As a deputy or clerk to the coroner. *Q.* What did you as such clerk or deputy at that inquest? *A.* I took down the testimony of each witness. *Q.* What paper do you now hold in your hands? *A.* The testimony of the different witnesses that was taken down before the coroner. *Q.* Look at page 24, and state whether you were present when that signature was written?

Objected to by defendant's counsel as immaterial. Objection overruled, and exception taken by defendant's counsel.

A. Yes. *Q.* Whose signature is it? *A.* Susan Hannah's. *Q.* In whose handwriting is the deposition on pages 22, 23 and 24, to which that signature is attached? *A.* In my handwriting. *Q.* Look at page 33, and state whether you were present when the signature on that page was written? *A.* Yes. *Q.* Whose signature is that? *A.* That also is the signature of Susan Hannah. *Q.* In whose handwriting is the deposition on pages 32 and 33, to which that signature is attached? *A.* Mine. *Q.* Look at these two depositions, and state whether or not, at the coroner's inquest, Susan Hannah testified as follows: "When I went there, I used to go occasionally into the sick room."

Objected to on the ground of impropriety. Objection overruled, and exception taken by defendant's counsel.

A. Yes. *Q.* And is it written so there?

Objected to on the ground of illegality. Objection overruled, and exception taken by defendant's counsel.

A. Yes. *Q.* Did she further testify that Mrs. Stephens' nieces were always in the sick room?

Objected to as illegal, leading and improper. Objection overruled, and exception taken by defendant's counsel.

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A. Yes. Q. Was her testimony in that respect taken down correctly?

Defendant's counsel objected to the witness reading from the paper when he was testifying, after he had refreshed his memory; and, secondly, that he had already answered the question.

Objection overruled, and defendant's counsel then and there excepted.

A. The evidence as given by different witnesses whose signatures are here, was taken down by me, and I can swear most positively to its correctness; I have not testified to the evidence taken before the coroner, from recollection. Q. Do you mean to say that all the evidence taken down in that paper, in your handwriting, was taken down by you from the witnesses as they gave it?

Objected to. Objection overruled, and exception taken by defendant's counsel.

A. Yes; all the evidence taken before the coroner from the different witnesses, was read by me, by the coroner's orders, to each of them, and they were requested by him to expunge everything that was incorrect, and to add anything that they desired, before signing their names; and each of them afterwards attached his or her signature. Q. Did Susan Hannah further testify that Fanny Bell was the principal attendant upon Mrs. Stephens?

Objected to as leading. Objection overruled, and exception taken by defendant's counsel.

A. Yes. Q. Did she further testify in these words: "She expressed a desire to take no more medicines?" A. Yes, sir. Q. Did she further testify as follows: "I did not go so close to her as to find out whether it was laudanum or not?" A. Yes, sir. Q. Did she further testify that Mrs. Stephens died about half-past two o'clock in the morning? A. Yes, sir. Q. Was Mrs. Susan Hannah left to swear as she wanted to before the coroner's jury? A. I always understood the coroner to be most anxious to sift everything as far as possible. Q. Was she left to swear before the coroner's jury as she wanted? A

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I do not recollect her being prevented. Q. Tell all you know about the fact of her being allowed to testify as she wanted.

A. I do not recollect of her being prevented in any way. Q. At the close of the examination, did the coroner say anything to them, and if so, what?

Objected to by defendant's counsel as immaterial; whereupon the court put the following question:

What was done in this particular case? Were these notes of yours read over to the witness before she signed them?

A. Yes, sir.

Q. After you read the depositions over to the witnesses, did the coroner make any request to them before they signed their names, and if so, what? A. The coroner requested them, if there was anything objectionable, to expunge it, and to add anything further that they wanted, before signing. Q. Did she further testify as follows: "I was in the house the day before Mrs. Stephens died, until about six o'clock in the evening?" A. Yes, sir. Q. Did she further testify as follows: "I returned at eight o'clock, and remained until she died?" A. Yes, sir. Q. Did she further testify as follows: "I gave her drinks, lager beer, ice water," &c.? A. Yes, sir. Q. Did she further testify as follows: "My brother gave nothing to Mrs. Stephens the day before she died, but milk and water?" A. Yes. Q. Did she further testify as follows: "All the matter vomited by Mrs. Stephens was yellow, green and other colors?" A. She said that what she vomited at the time was yellow, green and other colors. Q. Turn to page 36, and state whether or not you saw the signature on that page written. A. Yes, sir. Q. Whose signature is it? A. Isabella Hannah's. Q. In whose handwriting is the deposition on pages 34, 35 and 36, to which that signature is attached? A. It is mine, excepting a few lines in the handwriting of the coroner. The words on page 35, "Isabella Hannah being duly sworn, says," are in the coroner's handwriting. Q. In whose handwriting is the remainder of page 35? A. Mine. Q. In whose handwriting is so much of her deposition as is in page 36? A. It is in the handwriting of the coroner, except a few words of mine at the con-

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clusion. Q. Will you be careful to answer only when the matter is in your handwriting? Tell me from that part whether Isabella Hannah testified on the subject of scouring the floor, after Mrs. Stephens' death? A. She says, in this deposition, I never washed the matting on the floor. Q. Did she further testify as follows: "I was in and out of the house while Mrs. Stephens was sick? A. Yes, sir. Q. Did she further testify as follows: "My mother gave my aunt a drink?" A. Yes. Q. Did she further testify as follows: "I saw my uncle give my aunt a drink?" A. Yes. Q. Did she further testify as follows: "My aunt used to throw up a few minutes after drinking?" A. Yes. Q. Turn to page 41, and state whether or not you saw the signature on that page written. A. Yes. Q. Whose signature is it? A. Maria Hannah's. Q. In whose handwriting is the deposition on pages 39, 40 and 41, to which that signature is attached? A. Mine. Q. Did she testify as follows: "For three weeks previous to Mrs. Stephens' death, I called there every other day?" A. Yes. Q. Did she further testify as follows: "She departed at about ten minutes past two the following morning?" A. Yes. Q. Did she further testify as follows: "I did not see her get any medicine or drink during this time?" A. Yes. Q. Did she further testify as follows: "I saw my mother wet Mrs. Stephens' lips once with water; I did not see anybody else apply anything to her lips?" A. Yes. Q. Did she further testify as follows: "Half an hour previous to my aunt's death, my uncle threw himself upon the bed in the next room?" A. Yes. Q. Turn to page 45, and state whether or not you saw the signature on that page written. A. Yes. Q. Whose signature is it? A. George Davis'. Q. In whose handwriting is the deposition on pages 42, 43, 44 and 45, to which that signature is attached? A. Mine. Q. Did he testify as follows: "I believe I saw some phials standing upon the washstand or table?" A. Yes.

So much of the depositions as were testified to and proven by the witnesses, were then put in evidence.

Thomas Henry Jones, called and sworn on part of the People. Rebuttal.

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I reside at 182 East Twenty-third street, and am foreman the marble mill of William Peckham; I know James Hannah; he works at that marble mill, and did so in September 1857.

Q. In the book which you now hold in your hand, do you keep an account of the time of the men who work in the mill? A. Yes. Q. Tell me how much James Hannah worked there upon each day of the week ending the 19th day of September, 1857. A. He worked on Monday, one day; on Tuesday, one day and a quarter; Wednesday, one day and a quarter; Thursday, one day and a quarter; Friday, one day and a quarter; Saturday, one day. Q. How much did he work there upon the following days of the week, ending September 26th?

Defendant's counsel objected to the witness testifying from the book, as he should do so independently of it. Objection overruled and exception taken. Whereupon the District Attorney put the following question:

Q. Did you keep that book at the time? A. Yes, sir. Q. Did you make your entries correctly? A. Yes, sir. Q. Tell me, on the Monday of the following week how much he worked. A. One day and a quarter. Q. How much did he work on Tuesday? A. One day.

Henry Maxwell, called and sworn on the part of the People. Rebuttal: I reside at 125 East Thirty-first street, between the Second and Third avenues; I was a house agent up to July 1858, and for some time previous; I had been attending the Methodist church in Twenty-seventh street during the pastorate of Drs. Floy, Currey, Wheaton, and the present pastor; for some weeks previous to July, 1858, I was acquainted with Miss Sophia and Fanny Bell; I was a local minister, and attended during the absence of the pastor, and also prayer and class meetings; I have met these ladies in class; I have had them under my eye, when I occupied the pulpit, on many occasions, and I never saw any impropriety in their conduct and they held a respectable place in my estimation.

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Q. Do you know whether either of them were connected with the Sabbath school while there? A. I do not know; I have not met them in Sabbath school.

Cross-examination: I have never been turned out of the church; I never had a charge preferred against me; Mr. Brewer never brought a charge against me for defrauding him; I am not now a member; believe it will be two years next fall since I left it.

Defendant's counsel asked to have the entire testimony of this witness stricken out, on the ground of immateriality Motion denied, and exception taken by defendant's counsel.

John Bisco, called and sworn upon the part of the People, testified, that he was one of the coroner's jury, and that no witness was prevented from telling all he knew on the subject.

Charles Mulholland, called and sworn on the part of the People. Rebuttal: I reside at 380 Fourth avenue, and am a tailor; I am connected with the Twenty-seventh street Methodist Church, and have been a member about three years.

Q. Are you acquainted with Miss Sophia and Fanny Bell? A. By meeting them in class. Q. With which have you met? A. I believe Sophia, the elder sister; it was Dr. Moura's class; I met them there Sunday afternoon, about two o'clock; I cannot state as to the time when it closed, because it was closed by the time of the afternoon service; the class was held in a little room as you went into the church, at the right hand side; when we came out, the Sabbath school generally met us; I do not know Mr. Stephens. Q. This man? (pointing to the prisoner.) A. Yes, I have seen him there. Q. Do you know whether he had any situation at any time connected with the Sunday school? A. Yes; I have seen him at the door where the preaching was held, in the audience room or lecture room where the Sabbath school was held. Q. I wish to know now, during the time you have known the Misses Bell, whether you have observed any improper conduct in and about the church between them and the prisoner, James Stephens? A. I never have.

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Prisoner's counsel requested the court to strike out this testimony as irrelevant, and so instruct the jury.

The court refused, and defendant excepted to the ruling of the judge.

Miss Fanny Bell, recalled by the People in rebuttal.

Q. Did you at any time give Mrs. Stephens' any medicine?

A. No, sir. Q. Were you at any time during Sophia Stephens' sickness, sick in any degree from eating cabbage and beef, or any other article of food, except the rice mentioned by you on your previous direct examination? A No, sir; I never called Mrs. Stephens a liar; I never attempted to strike Mrs. Stephens with a bench, or anything else; I never threw a bench at her; during the last sickness of Mrs. Stephens, Mrs. Hannah came there about two days, until the last day, when she remained there about an hour; Isabella Hannah, now Isabella Bennett, was there about two days the first week my aunt was sick; she returned home, and I did not see her but three times until my aunt's death; it was sometime during the last two weeks, until about Saturday; she was not there until Saturday; the morning that my aunt died, Mrs. Hannah and I went over and woke her up out of bed, and told her that she was dead; during the last day of Mrs. Stephens' sickness, Isabella Hannah came into the house; during Mrs. Stephens' last illness, Maria Hannah was there; she stopped in some three or four times, perhaps a quarter or half an hour each time; I could not name every day when she was sick that she was there; she came about eight o'clock the evening before she died; she was not there during the first part of that day; when she came at eight o'clock, she remained until the next morning about four o'clock; Mrs. Hannah's husband was there two or three times; he was there in the evening generally; he came twice for Mrs. Hannah; once he came alone when she was not there; he came some time before the last Friday before she died; my aunt had not, to my knowledge, any swollen limbs prior to her last sickness; I had not known of her being troubled with vomiting prior to her last illness; I never saw her vomit until she got sick; I do not remember making,

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during Mrs. Stephens' last sickness, any article called flummery; I know William Knox; he never got into bed with my sister Sophia and myself, nor with me at any time whatever, nor did he ever sleep on the outside of a bed in which we or I were, except on the single occasion I testified to on my former direct examination; he did not get into bed with Sophia and me the night Isabella Bennett was under the prisoner's bed, nor did Sophia leave me at any time that night; Isabella Bennett never saw him come to bed with Sophia and me, or with me, nor did Maria Hannah, on a Sunday morning, or at any other time, find William Knox and me sleeping together.

Mrs. Mulholland, sworn by People, in rebuttal.

Q. I will ask you whether, as between the Misses Bell and Mr. Stephens, you ever saw any conduct that attracted your attention as improper? A. Never, at any time.

Elizabeth Kirk, sworn by People, in rebuttal: I reside at 101 East Twenty-second street; during the summer of 1857 I resided in Twenty-third street, corner of Avenue A, in Mr. Clark's house; I know Mrs. Susan Hannah, Isabella, Maria and James Hannah; they lived in the same house, up stairs, on the top floor; the fifth floor I think it is; I lived there four years; I left it in May, 1858; there was no other person by the name of Kirk lived in the house when I did; when I left that house I moved into Twenty-third street, corner of Second avenue; I left the city last fall; was gone about six weeks; I have been living in the city ever since; I do not know that I ever heard of rats being in the cellar; the cellar was not fit to be used for anything; it was always wet and slushy.

Q. While the Hannahs lived there, please inform me whether they or you kept food in the cellar—meat, butter, cheese? A. I guess there was not any food kept there by any one; I know I never kept any, not even coals; it was not in a fit condition to get into it; it was wet; I know Isabella Hannah, now Isabella Bennett; I recollect the occasion of Mrs. Stephens' funeral, because I lent some things to be worn.

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Sophia Bell, recalled for the prosecution, among other things, testified as follows: William Knox was never in bed with me, or with my sister and me, at any time; nor did he ever sleep in the same room with me, or with my sister and me, except the one time to which I testified upon my former examination; I never was in bed with the prisoner, neither at any time when Isabella Bennet was under it, nor at any other time; Maria Hannah did not find me asleep in a rocking chair at a time when William Knox was in bed with my sister Fanny; I never knew them to be in bed together, and I do not believe they ever were.

The prosecution here closed their rebutting evidence.

James H. Welsh, called and sworn for the defence, testified as follows: I am one of the police justices. (The testimony of William Knox before the justice, on the preliminary examination of the prisoner, was here shown to him.) My name, subscribed to the jurat, was written by me, and the witness was sworn by me; his testimony was reduced to writing by my clerk; I do not know whether it is correct or not.

The counsel for the defence then offered in evidence all the papers on the preliminary examination of the prisoner before Justice Welsh, including the affidavits of Fanny and Sophia Bell, on which the prisoner was arrested; to which was annexed the original anonymous letter hereinbefore set forth, and also the testimony of the witnesses, Dr. Francis W. Iremonger and William Knox.

The counsel for the prosecution objected.

The court overruled the objection, and admitted the papers in evidence.

The counsel for the defence had *Richard Stephens* called as a witness, who did not answer.

The counsel for the defence then stated that they had no other witness, and the court announced that the case was closed for the prosecution and for the defence, and directed the summing up to proceed.

The counsel on both sides then requested the court to adjourn until the following day to enable them, as they stated,

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to prepare to sum up, which the court, it being then only about eleven o'clock, A. M., declined to do. The counsel then mutually agreed that two should speak on each side, the defence opening, and the counsel then alternating, and the court assented thereto. After the motion to postpone had been made and denied as above, and after the arrangement to summing up had been made and announced to the court, the defendant's counsel, upon affidavit, moved to have an attachment issued against Richard Stephens, the same witness already examined on the part of the defence.

The court at that stage of the trial, and after what had transpired, refused on such affidavit to grant an attachment, to which refusal the defendant's counsel excepted.

The case was on the two following days summed up by the counsel for the defence and for the prosecution, and the court thereupon charged the jury as follows:

THE JUDGE'S CHARGE.

After a protracted trial, gentlemen, of nearly three weeks' duration, involving, in the main, a mere question of fact, and after so many hours spent by counsel in a minute and elaborate dissection of the evidence, I do not deem it proper, as it certainly is not necessary, that the court should still further task your patience by any extended remarks. I shall confine myself, therefore, to a very brief outline.

The prisoner is charged with the crime of murder, committed, it is alleged, about a year and a half ago, in September, 1857, on the person of his own wife—not by violence, or in an outburst of angry passion, but by the slow, stealthy and deliberate administration, under color of food or medicine, of repeated doses (I take no notice of the laudanum), of one of the most virulent poisons known in nature. I need not say to you, gentlemen, that such a charge, involving turpitude and cruelty almost surpassing belief, should be supported either by the clearest direct and positive proof, or by a mass of circumstantial evidence, all tending to one result, and so consistent in its leading features as to leave no reasonable room for doubt.

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Whether the evidence in the present case, taken as a whole, comes up to the required standard, it will be for you to determine. The court may aid, but cannot supersede your functions. The issues of life and death are, by law, in your hands, and yours exclusively. In analyzing evidence, gentlemen, especially where it is merely or mainly circumstantial, I have always found a great advantage in keeping steadily in view the two particulars of time and place. Chronology and geography, it has been well said, are the eyes of history. To begin, then, with the first date and place of any importance in this transaction: In the year 1848 or 1849, or about that period—the precise year is not material—there was a respectable family of the name of Bell, living in one of the interior northern counties of Ireland, settled mostly—I mention the circumstance as accounting for one of the features of the case—by persons of Scotch and English extraction. It consisted of the father, a maiden sister of about 36 years of age, two daughters, one about 16, the other about 11, a younger son, and it may be some other children. Into this family the defendant, then a young man of only two or three and twenty, and possessing, as we have a right to infer from the evidence, an unexceptionable character, was introduced as a suitor. Why he selected the aunt of 36 in preference to the niece of 16 is unexplained. All we know is that he did so—that his choice was ratified by its object, and that the wedding, or at least its essential preliminaries, took place under the brother's roof, and seemingly, and I think I may say actually, with the brother's approbation. Instead of the usual bridal tour—usual at least among Americans—the happy couple—for nothing is shown to indicate that they were not then happy—emigrated from the county of Cavan, a not very unusual occurrence, to the city of New York. Here we find them comfortably, and we may infer happily, established, occupying, although not very spacious, the entire of the third floor of the brick house known as 166 East Twenty-seventh street, divided into a sitting room, hall, two bedrooms and a kitchen—the dimensions of the whole being about 23 feet square. And here, in an evil

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hour—evil for both parties, as its consequences, in any view of them, most painfully demonstrate—they invited the eldest of their absent nieces to pay them a visit. She had then become an attractive young woman of eighteen. With her father's concurrence, and accompanied by two friends, she undertook the voyage, arriving in New York the day after her aunt had given birth to an infant daughter, and of course, in the midst of the joy which such an event was calculated to impart to both the parents, her reception, we may presume from the known attributes of the Irish character, was cordial and affectionate. One of the only two bedrooms at their command was assigned for her use; and, with commendable delicacy, that room was selected which alone opened upon the hall, and had no direct communication with the other, or with the parlor. Here she remained for a considerable time, learning—she went daily to the establishment for that purpose—the trade of a dressmaker. Having at length attained sufficient skill in the use of the needle, she procured a situation as dressmaker in a private family living on the Fifth avenue, not very far distant from her aunt's residence. On one occasion, while residing at that place—she continued, it will be remembered, to reside there about three years—Stephens, while the family were out of town for the summer, paid her a visit, bringing a bottle of wine with him. To gratify his curiosity, she took her uncle through the establishment, showing him the splendid furniture, and pointing out to him, among the other chambers, her own comfortable apartment. While so engaged, her uncle, she says, seized her and attempted an act of violence to her person, the consummation of which her threatened screams alone prevented. Is this statement true? No eye saw the act except her own and the prisoner's. Her subsequent silence on the subject of the alleged outrage has afforded matter of severe criticism. It is for you to judge of her explanation. She says the prisoner expressed great regret for the hasty indignity, and threatened, if she disclosed it, to separate from her aunt and break up the family. His penitence and his threats combined—although not quite reconcilable with each other—

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sealed her lips. But why, only six months after, did she return, even with the safeguard of her aunt's presence, to sleep under the roof of the man, although her uncle, who had so lately demonstrated his unfitness to be trusted? The first exceptionable occurrence, it will be remembered, if the testimony is to be relied on, took place about the month of September, 1856.

Shortly afterwards the youngest sister, then still in Ireland, being in bad health, was recommended, it seems, to take a sea voyage. A correspondence accordingly ensued, and the invalid was invited by her uncle and aunt, to make them a visit, to return, after a year's absence, to her native home. She (that is, Fanny Bell, the younger sister), arrived here, a girl of eighteen, in March or April, 1857, about six months after the occurrence alluded to, and about six months before her aunt's death. She (I mean Fanny Bell) went immediately to her aunt's house. It was natural that her sister there should join her, or be there to receive her. They could be company for each other, and (a consideration which, with their probably very limited means, was not to be disregarded), they could, as two sisters well might, occupy the same room and the same bed. Their father, too, little imagining such a scene as this trial presents, and having an entire confidence, it would seem, in the defendant's prudence and integrity, had instructed them to be guided in all things by their uncle's advice. Under the same roof also was their infant cousin, their aunt's bright and petted only child. The prisoner himself has demonstrated in the face of the court and jury the existence and probable force of that attraction. Whether these circumstances are sufficient or not to account satisfactorily for Sophia Bell's return to her uncle's house, notwithstanding the alleged outrage, it will be for you to determine. Assuming, for the present, that this first offence was attempted, was regretted and was forgiven—all of which you are to judge of—we may pass on to the next incident of importance which the testimony discloses. You will bear in mind that both sisters, although they went out to work as dressmakers, were now, in the spring of 1857, living with

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their aunt, contributing, as we may presume, one or both of them, to the expenses of the house during the six months (an important era) immediately preceding her death. Toward the close of that period, in the month of August, an altercation, it is alleged (it is the next incident in order), took place in the parlor between Stephens and his wife, about the funeral of a friend. Stephens dressed himself to attend it. His wife wished to accompany him. He refused to wait for her. Words passed, and he, it is said, struck her a blow in the eye, upon which she exclaimed that he was a murderer, or that he was murdering her. The door of the room, at the time, was not quite closed, and both the sisters were standing outside. On hearing the noise and the blow they entered, and saw their aunt with a handkerchief held to her eye. She wished them not to speak of what had taken place.

Such is their version of the second material incident bearing on the question of motive. The prisoner's counsel contend that the whole is a mere fiction, and, undoubtedly, there is some strong testimony which it is difficult to reconcile with the absolute truth of the statement. The existence of the black eye was subsequently perceived, it is true, by other witnesses, but others again did not observe it. The probabilities of the case may be, that a blow was given, but that its results were not so visible as to be noticed by a casual observer. In this way, only, if at all, can the testimony be reconciled. It may be proper here to add, as an established rule of evidence, that where testimony, seemingly conflicting, can be reconciled, perjury is not to be presumed.

In addition to the outrage referred to, one of the sisters swears that about the same period, although I do not understand her to speak of the same occasion, she heard the prisoner say he wished her aunt dead, or out of the way. Indeed, according to the accounts of both the sisters, contradicted strongly by other witnesses, he made no secret at this time of his unkind feelings toward her, treating her with much roughness and disrespect, both in word and manner, while he evinced, as some of his later expressions would seem to prove, a marked

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partiality toward one of the nieces. He dwelt particularly, they say, upon the unfortunate disparity in the ages of himself and wife, she being about forty-six, while he was only thirty-two. When he accompanied her, which, however, he often refused to do, it was a source of annoyance to him that the world should say she looked old enough to be his mother. On the other hand, however, the prisoner has shown by numerous witnesses, that the kindest relations subsisted between himself and his wife, and that in her dying moments she addressed him in terms of tenderness and endearment. But assuming, on this point, all the evidence on the part of the prosecution in its main outlines to be true, it is far from sufficient, by itself, to make out a case of contemplated murder. Spleen, and disappointment, and jealousy, and ill-humor, may exist without the remotest approach to a murderous intent. Even a blow in the face, if with the hand merely, scandalous and unmanly as it may be on the part of the perpetrator, where a woman is the object, and especially if that woman be a wife, is no evidence, or, if any, very slight, of a design to kill.

There occurred, however, simultaneously, or about simultaneously with this transaction, the most important incident which the testimony has disclosed. Mr. Flynn, a druggist residing in the Second avenue, within a very short distance of the prisoner's home, whose place the prisoner had for several years been in the habit of visiting, swears that about six weeks before Mrs. Stephens died, he sold her husband a parcel, consisting of half an ounce of white arsenic, and again, in the course of the ensuing week, another like quantity of the same material. A fact like this, if unexplained, would add terrible significancy to the previous outrage, if that outrage, as the prosecution contend, was actually perpetrated by the prisoner. You will, therefore, give to the evidence—somewhat contradictory as it seems to be—in relation to the alleged blow inflicted upon the deceased, the most careful consideration. Whether you find the blow to have been inflicted or not, or whether you find it to have been a comparatively slight or a more severe one, the inquiry will still have to be answered

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(the contradicting testimony of James Hannah I shall presently consider), what induced the purchase and repeated purchase by the prisoner, at the time referred to, of so large a quantity, or any quantity of a known deadly poison, and to what purpose was it to be, and was it in fact applied? We find the wife of the prisoner, on or about the 6th of September, within a few weeks or days after the purchase, complaining, though very slightly, of a pain in her chest. Her husband, contrary to her wishes, sent for a physician. The physician, after two attendances, deeming the matter of little consequence, discontinued his visits, and at the end of a year and a half, so slight had been the impression made upon his mind, was unable to recollect the symptoms of his patient. In ten or eleven days, however, the case assumed a serious form, and another doctor was sent for. This was five days only, I think, before the patient's death. He found the patient suffering from pain in the pit of the stomach, and vomiting, and great debility. His visits, nevertheless, after three short attendances, of only a few minutes each, by direction of the prisoner, it is said, were discontinued, and in thirty-six to forty hours thereafter, his late patient was a corpse. Her death took place at about 2 o'clock, on the morning of the 23d September, 1857, being the 18th day from the commencement of her illness, if we count from the first visit of Dr. Cadmus, on the 6th of that month.

You have heard detailed by three or more witnesses, the burning thirst and other symptoms which exhibited themselves during that period, and especially on the Sunday, Monday and Tuesday, preceding its termination. You have also heard from the lips of some of the most distinguished members of the medical profession—all agreeing in the main features of their testimony—what are the effects exhibited before death where arsenic has been taken in poisonous quantities, and which of those effects are peculiar to that one cause. On these statements, weighing them deliberately, it will be for you to determine, as one of the steps to your ultimate conclusion, whether the symptoms in the case before you were, in point

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to be charitable, I have found some difficulty in answering this question. It may have been that "his poverty, not his will, consented." But why not make at least an effort? When, with the terrible sufferings of his wife before him, the mother of his only child, sufferings sufficient to excite the sympathy of the coldest, and to prompt the most indolent to exertion, why did he not go—I had almost said rush—to the physician, and beg, if he could not buy him, to come to her relief? The act might have been ineffectual, but it would at least have been demonstrative of kindness and hope. Instead of that, the prisoner, through one of his witnesses, tells us that, yielding to his wife's entreaty, he retired to an adjoining room, went to bed, and did not return till the lapse of five or six hours, at the moment the sufferer was drawing her last breath before dissolution.

The prisoner at the time, gentlemen, it will be recollected, was not a giddy, thoughtless youth. He was a man thirty-two years of age—a father, a member of the church, a teacher in one of its Sunday schools. What, then, it may be asked, does such conduct, under such circumstances, indicate. Does it indicate merely apathy and indifference, or does it indicate, with other circumstances, a transfer of the husband's affections from his wife to another object? In this connection it must be observed that the defendant himself has proved, by his own witnesses, a very striking intimacy, both before and after the death, between himself and his wife's niece; an intimacy which, in an anonymous letter, he was willing to insinuate had reached, or nearly reached, the point of actual criminality. As it is your province, however, gentlemen (it being a criminal case), to determine the meaning of that letter, in the light of the surrounding circumstances, and to ascertain, with that aid, the inferences legitimately to be drawn from it, and as its bearing upon the question in issue is deemed to be of controlling importance, reflecting its shadows back upon the dark night of the 22d of September, I shall detain you a few moments by laying before you once more its literal contents. It was ad-

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dressed, you will recollect—I mean the envelope—to Mr. Samuel Cardwell, the supposed suitor of the lady.

(The judge then read the letter in the hearing of the jury.)

If then, gentlemen, you find that the deceased died of the effects of arsenic, that the poison was not given to or taken by her through mistake or accident, that it was administered designedly by some person attending on her, that there is no reasonable ground for attributing the deed to any person other than the prisoner, you will still have to consider whether the case against him, calmly viewed in all its bearings, is so clear as to admit of an unhesitating verdict of conviction. Hesitation in capital cases, as you well know, is the property of the accused. A lurking, anxious impression of possible innocence, should such impression exist, is enough to stay the hand of criminal justice. It is better, says the law, that ten guilty should escape than one innocent suffer. By this, however, you will not understand me as expressing or implying an opinion on the offence with which he is charged, for or against the prisoner at the bar. That is your prerogative, as it is your painful duty, and to you I leave it.

Thereupon the counsel for the defendant excepted to each and every part and portion of the said charge, as being contrary to both the law and the fact.

Which exception the court refused to allow.

The counsel for the defendant requested the court to present the following propositions to the jury as part of its charge:

1. That the counsel for the prosecution having read to the medical witnesses certain symptoms from a paper marked by the judge, and inquired their opinion as to the cause of death in a case where such symptoms existed, if the jury believe that the symptoms of which Mrs. Stephens complained in her life time, are not in all respects the symptoms stated in the paper read to the physicians, that then the medical opinions are not admissible as competent evidence to be weighed by the jury, and cannot be taken into consideration.

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2. That if the jury are of opinion that the body of Mrs. Stephens, after being exhumed for analysis, was so exposed that access could be had to it by other parties than those who made the *post-mortem* examination of the body and conducted the chemical analysis, and particularly if they believe that Robert Bell, one of the witnesses for the prosecution, who first charged the prisoner with poisoning his wife, actually had access to the body and touched it, an analysis made under such circumstances is not competent evidence against the prisoner, and should be disregarded by the jury.

3. That when a prisoner is charged with the commission of a crime, and evidence of good character is introduced by him, which is not controverted on the part of the People, such evidence is to be considered by the jury, and is not merely of value in doubtful cases, but will of itself sometimes create a doubt, where, without it, none could exist; and if good character be proved to the satisfaction of the jury, it should produce an acquittal, even in cases where the whole evidence slightly preponderates against the accused.

4. When a charge depends upon circumstantial evidence, it ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.

5. That if the jury, upon considering the whole of the evidence, have a reasonable doubt of the guilt of the defendant of the offence charged in the indictment, it is their duty to acquit.

6. That if the jury believe that Robert Bell attempted to assassinate the prisoner before his arrest upon the charge of poisoning his wife, and that he entertained feelings of animosity and hatred towards him, and that if the jury believe that Sophia and Fanny Bell are also hostile towards the prisoner, and have quarrelled with him, that then they should consider these matters in weighing the degree of credit which is to be given to their testimony.

The court then charged affirmatively on each of the said propositions, as requested by the defence, except the second,

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on which, modified so as to read as follows, the court also charged affirmatively :

That if the jury are of opinion that the body of Mrs. Stephens, after being exhumed for analysis, was so exposed that access could be had to it by other parties than those who made the *post-mortem* examination of the body, and conducted the chemical analysis, under such circumstances that they could have applied arsenic to it, and particularly if they believe that Robert Bell, one of the witnesses for the prosecution, who first charged the prisoner with poisoning his wife, actually had access to the body and tampered with it, so much of the analysis as was made after the body was so exposed and tampered with, is not competent evidence against the prisoner, and should be disregarded by the jury: to which refusal of the court to charge in favor of the second proposition as submitted, and to the charge of the court in favor of the second proposition as modified, the counsel for the prisoner excepted. The counsel for the defence then presented the following exceptions to the judge's charge:

1. The counsel for the defence excepted to the remark of the judge that a suggestion had been slightly indicated in some of the statements of the defendant's witnesses, that the blood nieces of the wife were the authors of her death, on the ground that the counsel for the prisoner had in his summing up to the jury expressly disclaimed such a position.

2. The counsel for the defence excepted to the reading by the judge of the anonymous letter as a part of his charge, and to the judge's comments thereon; and the judge thereupon said to the jury: "You, gentlemen of the jury, are the sole judges of the authorship of this letter, its transmission, the interpretation of its contents, the effect of it in this case, and of everything pertaining to it."

3. The counsel for the defence excepted to the remark of the judge, "What will not a man give in exchange for his life," in the connection in which it was used.

The court then further charged the jury that they alone were the judges of all questions of fact; that if the court had

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expressed any opinion upon the evidence, or any part of it, the jury were still to determine for themselves what the evidence was, what weight was to be given to it, and what effect it should have in the cause, giving the prisoner the benefit of every reasonable doubt.

The following writ of *certiorari* was allowed and issued in this case :

The People of the State of New York, to the clerk of the Court of Oyer and Terminer of New York, *Greeting* :

Whereas, a writ of error was allowed by Daniel Pratt, one of the Justices of the Supreme Court, directed to the clerk of the Court of Oyer and Terminer, wherein James Stephens was plaintiff in error, and the People of the State of New York defendants in error, which writ was made returnable to this court on the seventeenth day of May, instant, and which writ was returned by the said clerk on the said last mentioned day, together with the record of the trial, and conviction of the said James Stephens of the felony of murder, and the judgment of the said court thereon ; and whereas, it has been alleged by the affidavit of said James Stephens, that there is a diminution in the record and the matters returned by the said clerk of Oyer and Terminer, with the said writ of error, which it is suggested to the court here, are necessary to be returned, in order that it may correct and redress the errors which it is alleged have happened in the said Court of Oyer and Terminer, in the trial and proceedings in the case of the said James Stephens ; and whereas, it is alleged that the diminution in the said record and proceedings consists in the omission to return the following matters and things, to wit :

First—The reasons filed in the said Court of Oyer and Terminer by the said James Stephens for a new trial and in arrest of judgment.

Second—The affidavits made and filed in said court on the twenty-ninth and thirty-first days of March, to wit: the affidavits of Edward Murray, Leonidas Abbott, James Ste-

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phens, Nelson J. Waterbury, Robert Ogden Doremus and Abraham Gump.

Third—A certified copy of the minutes and docket entries kept by the clerk of the said Court of Oyer and Terminer, which contained the entries and proceedings which were had in the case of said James Stephens.

Now, we therefore command you, the said clerk of the Court of Oyer and Terminer of the county of New York, that you distinctly and plainly, under the seal of the Court of Oyer and Terminer aforesaid, and under your certificate as the clerk thereof, forthwith do send to a general term of the Supreme Court of the first judicial district of the State of New York, now being holden in the city of New York, all the matters and things hereinbefore specified and mentioned, and constituting, as it is alleged, the diminution of the record and proceedings had in the case of the said James Stephens, in the said Court of Oyer and Terminer, together with this writ thereto annexed, that we may further cause to be done in the said premises what of right ought to be done.

Witness, James J. Roosevelt, presiding justice of the said Supreme Court, sitting in the first judicial district, the 23d day of May, 1859.

[L. s.]

JOHN CLANCY, *Clerk*.

The foregoing writ of *certiorari* is allowed according to its terms, but without prejudice to any questions, and we direct that the same be sealed and signed by the clerk of the Supreme Court.

By the Court,

J. J. ROOSEVELT, *P. J.*

To which a return was duly made of all the papers called for by such writ.

S. B. Cushing and *John W. Ashmead*, for the plaintiff in error

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I. The question arises in this case, what is the record, and what will the court regard as such? It will be contended, on the part of the plaintiff in error, that the record is an authentic testimony in writing of the proceedings in an action at law, which is preserved in a court of record. In other words, it may be defined to be a written memorial made by a public officer, authorized by law to perform that function, and intended to serve as evidence of something *written, said or done*. Hence, every transaction which appears authoritatively to have taken place during the trial of the case, makes up the record. *Britton* (ch. 27), says: "That a record is an authentic testimony in writing, contained in rolls of parchment. In these are contained the judgment of the court in each case, and *all the proceedings previous, carefully preserved*." So *Blackstone* says (1 *Com.*, 69), the judgment itself, and *all the proceedings previous thereto*, are carefully registered and preserved under the name of *records*, in public repositories set apart for that particular purpose; and to them frequent recourse is had when any critical question arises. (18 *Viner's Ab.*, 176; *Jewell v. The Com.*, 10 *Harris R.*, 94; *Fisher v. Cockerell*, 5 *Pet. R.*, 253; *Read v. Marsh*, 13 *Pet. R.*, 153; *Sutcliffe v. The State*, 18 *Ohio R.*, 469; *Com. v. Pfeifer*, 3 *Harris R.*, 489; *People v. Cancemi*, 7 *Abbott Pr. R.*, 299; 2 *R. S.*, 921.)

II. A challenge for principal cause forms part of the record, and also all affidavits filed below. None of the affidavits which were read in the Court of Oyer and Terminer, nor any of the challenges made in the present case, appear on the return to the writ of error, but have been brought up on the *certiorari*. The minutes or docket entries, are also a part of the record. *Ex parte Vermilyea*, 6 *Cow. R.*, 555; *Jewell v. The Com.*, 10 *Harris R.*, 94; *Sutcliffe v. The State*, 18 *Ohio R.*, 469; *Com. v. Pfeifer*, 3 *Harris R.*, 489; *Beal v. Langstaff*, 2 *Wilson*, 371.)

III. The term of the Court of Oyer and Terminer, at which the defendant was tried, having ended, the record must stand as it is, and is not susceptible of amendment, the statute of Jeofails not extending to criminal cases. "During the *term* wherein any judicial act is done, the record remains in the

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breast of the judges of the court, and in their remembrance, and therefore the roll is alterable, during that term, as the judges shall direct; but when that term is past, it admits of no alteration, averment or proof to the contrary." (*Co. Litt.*, 260, a.; *The King v. Selfe*, 8 *Mod. R.*, 45; *Bold's Case*, 1 *Salk. R.*, 58; *King v. Keat*, 1 *Salk. R.*, 48.)

IV. Whenever an amendment to a record in a criminal case is permitted, it is made from the minutes or docket of the clerk of the court, or the clerk of the assize, but there is no instance of the minutes or docket entries being corrected by what is subsequently made up and termed the record. (*Davenport v. Israel*, *Cumberback's R.*, 285; *Hill v. Prowse*, *Noy's R.*, 118; *Tidd's Prac.*, 931.)

V. The District Attorney has no authority, by law, to make up a record in any criminal case, except when requested by a *defendant*; and he can only furnish the clerk of the court in which the defendant is convicted, the *statement of the offence* required to be entered in the minutes of the clerk. (*R. S.*, part 4, title 6, art. 1; 2 *R. S.*, 921, §§ 4, 6, 7, 8, 12.)

VI. The record, in the present case, does not show that the prisoner was present in court during the whole of the trial, nor at the rendition of the verdict. The following cases establish the position that such an omission is fatal. (*Dunn v. The Com.*, 6 *Barr's R.*, 389; *State v. Travers*, 1 *Overton R.*, 434; *People v. Perkins*, 1 *Wend. R.*, 91; *Rex v. Ladsingham*, *T. Raymond R.*, 193; *Holliday v. The People*, 4 *Gilmans R.*, 111; *Co. Litt.*, 227, b.; *Cole v. The State*, 5 *English R.*, 318.)

VII. The record shows, and also the affidavits, which make a part of it, that the jury were permitted to separate during the trial of the defendant, and suffered to mingle with their fellow citizens, and were not kept together in the care of sworn officers and bailiffs. Such a separation is fatal to a verdict, against the prisoner in a capital case. Such is the English law. (*Hays' Cr. Dig.*, 449; *King v. Stone*, 6 *Durn. & East.*, 53.)

VIII. The weight of judicial authority, in the other States of the Union, is in conformity with the English rule. (*Com. v. Caul*, 1 *Virg. Cas.*, 271; *Wiley v. State*, 1 *Swan*, 256; *Pfeifer*

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v. *Com.*, 3 *Harris*, 468; *Wesley v. State*, 11 *Humph.*, 502; *McCann v. State*, 9 *Sme. & Mar.*, 465; *Com. v. Wormley*, 8 *Grattan*, 712; *State v. Prescott*, 7 *N. Hamp.*, 287; *Berry v. State*, 10 *Geo.*, 511, *Brayton*, 169; *McLean v. State*, 8 *Miss.*, 153; *Jones v. State*, 2 *Blackf.*, 475; *Cochran v. State*, 7 *Humph.*, 544; *Boles v. State*, 13 *Smead. & Marsh.*, 398; 5 *Geo.*, 85; *Com. v. Roley*, 2 *Pick.*, 496.)

IX. The law of New York, in respect to the separation of jurors, during the trial of a capital case, is similar to the English law; and, when it is permitted to take place, whether *with* or *without* the consent of the court, will vitiate the verdict. (*People v. McKay*, 18 *John.* 212; *Eastwood v. The People*, 3 *Park. Cr. R.*, 25.)

X. The record in the present case, shows that the trial of the prisoner continued three weeks, and that during all that long period of time the jury were not kept together, but permitted to mingle with the community. If the separation of one or two jurors, for a short time, from the rest of the panel, is in law sufficient ground to set aside a verdict in a capital case, how much is the necessity for doing so increased, where the whole of the jurors were suffered to disperse during the period of an exciting trial.

XI. In the case of the present defendant, it was *not* shown *affirmatively* on the part of the prosecution, and by *the clearest evidence, and beyond a reasonable doubt*, or by any evidence at all, that no injury to the prisoner occurred in consequence of the separation of the jury; but it was shown by affidavit, on the part of the prisoner, that the principal witness for the prosecution talked with two of the jurors on the subject of the trial, during the intervals of the adjournments of the court.

XII. It is not true, in point of fact, that the separation took place by the agreement of the defendant's counsel. They stated they had no objection to the jury separating. Still, the record alleges that it was with their *consent*, and that is the aspect in which it must be considered here. Our point, therefore, is that if the *separation* of the jury was with the consent of the prisoner, and with the approbation and approval of the court,

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the numerous objections of the prisoner's counsel, none are well taken; because:

1. The witness had a right to refresh his memory by reference to a deposition of the witness whom he was called to impeach, which he reduced to writing "most correctly," as the words fell from that witness' lips.

2. The witness did not and need not testify entirely from recollection. (*Russel v. Hudson R. R. R.*, 17 *N. Y. R.*, and cases there cited.)

The same authorities dispose of the objections taken to the testimony of Thomas Henry Jones, Jr.

VII. The questions propounded to Dr. Finnell and Dr. Clark were proper, and such questions have often been put and answered against objection. (*The People v. Hendrickson*, 1 *Park. Cr. R.*, 406; affirmed by the Court of Appeals, 2 *Kern.*, 358-363.)

They were the identical questions, in substance (though amplified), that had been put, over and over again, by the prisoner's counsel to these and other medical witnesses.

VIII. The question of the refusal of the court below to issue an attachment, does not properly belong here. It can only be taken advantage of (if erroneous) in the court below, on a motion for a new trial, on the ground of surprise.

But if the question is properly *here*, then, we say, the motion was properly denied; because:

1. There was no valid proof of the service of the subpoena—that is, the affidavit did not state when or where the subpoena was served. The affirrant merely stated his opinion of the law. The subpoena might have been served in New Jersey or Connecticut.

2. The affidavit does not show what kind of a subpoena had originally been served, nor that the witness *had disobeyed any writ of subpoena*. (2 *R. S.*, 540, § 34.)

3. The witness had attended and been examined and cross-examined, and discharged by the court for some days, and no subsequent subpoena had been served upon him, nor had notice to again appear been served upon the witness for a reasonable

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time. (*Gra. Pr.*, 2d vol., 267; 1 *Str.*, 510; 1 *Marsh.* 410; 1 *Bing.*, 366; 2 *Str.*, 1054.)

4. The attachment was not applied for at the opening of the court, nor until about one-half hour after the evidence had been closed on both sides, and the respective counsel had arranged the order of their addresses to the jury. (*See Gra. Pr.*, *above cited*, and 2 *Tidd*, 723.)

5. The circumstances of the case rendered the appearance of the application for the attachment *extremely suspicious*.

6. It did not appear that the witness was necessary or material, and the court should not grant the severe process of attachment against witnesses, unless this be shown. (2 *R. S.*, 540, § 34.)

7. It is discretionary with the court to grant an attachment or not. (3 *Wend.*, 376; 4 *Id.*, 229; 19 *Id.*, 569; 1 *Hill*, 300; 4 *Id.*, 119.)

IX. The exception taken by counsel for the prisoner, to the reference made by his honor to the anonymous letter, while charging the jury, appears to be simply an exception to a judge's referring to the evidence while charging a jury; especially so, when it is remembered that no objection was taken to the competency of the letter as evidence at the time when it was read in *evidence*.

X. The remaining exceptions in the case may be disposed of as follows, to wit:

1. To the question, "Do you know whether, during that one week, your aunt partook of any fluid or not," simply frivolous.

2. The inquiry as to the effects of the rice on the witness Fanny Bell, was properly allowed. It tended to show poison administered by the prisoner to his wife; it tended to prove the issue.

3. The conversation between the witness Fanny Bell, and Mrs. Stephens, just before she partook of the rice, was competent evidence to show her physical condition, and the progress of the poison.

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4. The mass of papers taken before Police Justice Welsh and the coroner were not evidence for the prisoner; but yet, on prisoner's motion, were received. The evidence of Dr. Doremus and Wood and the Misses Bell before the coroner, was admitted as far as they had been examined in respect thereof.

5. The testimony of Mrs. Harvey, as to the provisions in the cellar, and to the condition of the cellar generally, was competent and properly admitted, as rebutting any supposition which might have been raised by the evidence of the Hannahs, that the arsenic alleged to have been purchased by the prisoner, was used by them to preserve their provisions in the cellar. The same applies to testimony of Mrs. Kirk.

6. Henry Maxwell's testimony related to conduct of Misses Bell, reflected on by defendant's witnesses, and covered same time embraced in their testimony.

7. John Biscoe's evidence was material, as impeaching the witnesses Hannahs, in regard to the alleged refusal of the coroner to allow them, at the inquest, to state certain facts known to them, tending to exculpate the prisoner.

By the Court, LOTT, J. The plaintiff in error was tried at a Court of Oyer and Terminer, held in and for the city and county of New York, on an indictment charging him with the murder of his wife.

His trial commenced on the 7th day of March, 1859, and was continued by adjournment from day to day until the twenty-sixth day of that month.

The jury found him guilty, and judgment has been rendered on their verdict.

That judgment, with a bill of exceptions, containing various exceptions taken to decisions of the court on the trial, was removed on a writ of error to this court for review, and subsequently, on an allegation that there was a diminution in the record, and the matters returned with said writ, a further return was made in obedience to a writ of *certiorari*, which was

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allowed and issued for that purpose, without prejudice to any questions that might arise thereon.

By that return, it appears that the court, during the progress of the trial, usually adjourned between three and four o'clock in the afternoon of each day, till ten o'clock the next morning, except on Saturday, the 12th and 19th of March, when the adjournment was made till the Monday following, at ten o'clock A. M., and that the jurors during each adjournment, except that on the 25th day of March (when they retired to deliberate on their verdict, under the charge of four sworn officers), were permitted to separate.

It thereby further appears that motions for a new trial and in arrest of judgment were made before judgment was rendered, and that affidavits which are returned were read in support of and in opposition to such motions.

It is insisted by the counsel for the People that the matters brought up by the *certiorari* formed no part of the record, and cannot be considered by this court.

Without expressing any opinion on that point, we will, in view of the importance, particularly of one of the questions presented, here assume that these matters are properly brought up for review, and proceed to consider the case on that assumption.

The principal question to be examined is, whether the separation of the jury during the progress of the trial was illegal and vitiated the verdict.

That is a question of great practical importance, and its decision will affect not only the verdict and judgment in this case, but if the objection against the proceeding is valid, will, to a great extent, change the course of trial in all cases of felony. It is believed to be the general practice in trials of indictments for felonies of any grade, except that punishable by death, to permit a separation of the jury, and judges of extensive experience have extended that practice to capital cases. The question is presented as one of *power*, and will be considered in that aspect.

It is said by Lord Coke (*Co. Litt.*, 227, *b.*), that "a jury sworn and charged, in case of life and murder, cannot be discharged by the court or any other, but they ought to give a verdict." (*See also 3 Inst.*, 110.) The universality of that rule was questioned at an early day, and after a full deliberation in the case of the two *Kinlocks* (*Foster*, 22), it was held by nine out of ten judges, giving their opinions seriatim, not to be universally binding.

Sir M. Foster, in giving his opinion, states several exceptions to the rule, and showed that the only authority cited by Lord Coke in support of the position, did not in the least warrant it; and that the authority itself was subsequently overruled, and he comes to the conclusion that the power of the court in discharging juries is not capable of being determined by any general rule, but must be governed by the particular circumstances of the case presented.

That principle was afterwards recognized by Mr. Justice Blackstone in his Commentaries, who, in treating of trials in criminal cases, says that "when the evidence on both sides is closed, and, indeed, when any evidence has been given, the jury cannot be discharged (unless in cases of evident necessity), till they have given in their verdict." (4 *Com.*, 360.)

Exceptions are thus engrafted on the general rule as laid down by Lord Coke, and cases of necessity being admitted to form exceptions, it is necessarily left to the discretion of the court to judge of that necessity.

It appears from what is stated in *Rex v. Stone* (6 *Durn. & East.*, 527), tried at bar, that it was formerly deemed necessary, in order to carry out that rule, that a trial in a criminal case should be continued without interruption from its commencement to its close. In that case, the inconvenience, if not impossibility, of a strict adherence to that requirement became apparent. The prisoner was tried on an indictment for high treason, and it is stated in the report of the case that the court having sat, on the first day of the trial, from nine o'clock in the morning till ten o'clock at night, without any interruption or refreshment, the Attorney-General stating that his evidence

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would occupy four hours more, and some of the jury being very much exhausted, and incapable, as they declared, of keeping up their attention much longer, the court adjourned till nine o'clock the next morning; Lord Kenyon observing that necessity justified what was compelled, and that though it was left to modern times to bring forward cases of such extraordinary length, yet no rule could compel the court to continue longer sitting than their material powers would enable them to do the business of it.

The jury retired to an adjoining tavern, where accommodations were prepared for them, and the bailiffs were sworn "well and truly to keep the jury, and neither to speak to them themselves, nor suffer any other person to speak to them touching any matter relative to the trial." It is stated in a note to that case, that at the Old Bailey, in the latter end of 1794, the trials of various persons for high treason lasted, Hardy's, nine days; Horne Tooke's, six days; and Thelwall's, four days. On the first of these trials, the adjournment was stated to be made by the consent of the prisoner, but on the second, the judges who sat, having in the meantime conferred with the rest of their brethren, said they were clearly of opinion it might and ought to be done *by the authority of the court*, without calling on the prisoner for any consent.

The rule was subsequently further relaxed in cases of misdemeanors, so far as to permit a separation of the jury without the custody of any officers during the progress of the trial, and the practice was sustained, after full consideration, in *Rex v. Woolf* and others, decided in 1819. (1 *Chitty R.*, 401; also reported in 2 *Barn. & Ald.*, 462.) The defendants in that case were tried on an indictment for a conspiracy, before Abbott, Ch. J., and found guilty. Their trial lasted two days. The court, at about eleven o'clock P. M. of the first day (the case being then unfinished), adjourned until the following morning, and the jury were permitted to separate and retire to their respective homes without the knowledge of the defendants or their attorneys, and on that ground an application was subsequently made to set aside the verdict.

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The judges, Abbott, Ch. J., Bayley, Holroyd and Best, justices, delivered their opinions *seriatim* against the motion.

Chief Justice Abbott said his opinion was founded on the admitted fact that there were many instances of late years in which jurors in trials for misdemeanors had dispersed and gone to their abodes during the night for which the adjournment took place, and he considered every instance in which that had been done, to be proof that it may be lawfully done; and Justice Best, after referring to the cases cited in support of the motion, concludes that the only one which touched the question under consideration, was that of Lord *Delamere*, in the 4th *State Trials*, 232, where, as he remarks, the judges appeared to have said that a jury once charged cannot be discharged.

In reference to which he says that such might have been the law at one time, but that the constant and uniform practice which had existed for a considerable length of time in discharging juries, would show that which was said in Lord *Delamere's* case was not to govern their decision.

The other cases were those where there had either been improper conduct on the part of the jurors after they were sent out to deliberate on their verdict, or where improper practices had been used by the parties to influence the decision of the jury in their favor. (See also 1 *Chitty's Cr. L.*, 628.)

It thus appears that in England the rule as laid down in *Blackstone* is so construed as to concede that the court have the power to permit a separation of the jury in cases of misdemeanor, and that its exercise is left entirely to the discretion of the court. It is true that no decisions have been produced establishing that authority there in capital cases, nor, on the other hand, have we been referred to any denying it. The important consequences dependent on the results of such trials, are calculated to secure and enforce all precautionary measures necessary to guard against improper influences, and may have restrained the judges from exercising the discretion vested in them.

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The rule itself excepts no class of offences from its operation, but all are alike comprehended within its inhibitions.

When, therefore, it is established that the *power* to authorize a separation exists in one class of cases, it is difficult to see why it does not exist in all. The power itself may be general, while its exercise, in a sound discretion, may be limited.

In this country there has not been a uniformity of practice on the question under consideration. While it is conceded (I believe without exception) to be discretionary with the court, whether the jurors shall be kept together or be permitted to separate on trials of misdemeanor, that right, in cases of felony, is denied in some of the States, in others it is not only admitted and fully recognized, but the rules applicable to the exercise of that power in civil cases, are extended to criminal cases, so far even as to authorize a sealed verdict to be rendered. Thus it was held in a case in Missouri, decided in 1843, and in cases in Pennsylvania and Tennessee, decided in 1851 (all capital cases), that the separation of jurors by the permission of the court (and in the last two cases by the consent of the prisoner) was a ground for setting aside a verdict. (See *McLean v. State*, 8 *Miss.*, 153; *Pfeifer v. Com.*, 3 *Harris*, 468; and *Wesley v. State*, 11 *Humph.*, 502.)

It is stated in the case of *Berry v. State*, decided in Georgia in 1851 (10 *Geo.*, 511), in which the prisoner was convicted of larceny, after a separation of the jury by consent during the trial, that it was the duty of the court to keep the jury together in criminal cases, from the time the case is submitted to them until they are finally discharged from its consideration; but they nevertheless refused to grant a new trial.

In Ohio, the court, after full deliberation, have decided that it was not only competent to permit a separation of the jurors during the progress of the trial, but they have permitted them, on the submission of the case, to disperse after they had agreed, and return a sealed verdict. (*Sargent v. State*, 11 *Ohio*, 474; *State v. Engle*, 13 *Ib.*, 490; *Davis v. Same*, 15 *Ib.*, 72.)

The first of these cases was for passing counterfeit money; the second for manslaughter, and the last for arson.

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Several cases were cited on the argument, the principal of which are referred to by Justice Selden in *Eastwood v. The People* (3 Park. Cr. R., 25), showing the consequences of a separation of a jury after the case was finally submitted to them for deliberation and decision. Some of these assert the doctrine that the fact of separation alone vitiates the verdict, while in others it is held that abuse, or at least reasonable suspicion of abuse, to the injury of the prisoner, must be shown. The principal, and generally considered as the leading case in support of the first position, is that of *The Commonwealth v. McCaul* (1 Virginia Cases, 271).

In that case (which was one of felony for taking bank notes and coin from the State treasury), it appeared that the court, on the second, third and fourth days of the trial, made a temporary adjournment of a short duration, about two P. M., and that a general order was given by the court to the jury and the officers on the first evening of the trial, that the jury, on their being adjourned, should be kept together and not separated. Notwithstanding this direction, one of the jurors, against the remonstrance of the officer, went home for his dinner, and another, attended by an officer, visited his family, assigning the sickness of one of his children as his excuse. They remained from fifteen to twenty minutes. The first was asked by several persons whether the case of McCaul was determined. He said no, and no further conversation was had on the subject, and he excused his conduct on the ground of being unexpectedly sworn on the jury, leaving his business in such a state of derangement as to require his presence. The verdict was set aside, and Judge Nelson, in giving his decision, says: "The majority of the court were of opinion that proof of actual tampering or conversation on the subject with a jurymen, was not necessary to set aside the verdict. The old rule was, that the jury was on no occasion to separate. I understand (though it was with difficulty the rule had at all been relaxed), that it relaxed only in cases of imperious or perhaps unavoidable necessity; such a proceeding would be productive of evils incalculable, and too great for the court by its de-

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cisions to allow a door to be opened for them. Every danger, and particularly in such a case as this, should be watched and opposed in the beginning. The court will presume with fear and jealousy, and will not expose the trial by jury in criminal cases, to such risk of contamination as arises from the affidavits in this case. If the court had without necessity suffered a jurymen to go home without an officer (which it would never do), it would vitiate the verdict. There is as much danger in suffering a jurymen to separate without the consent of the court, as if it had been done by such consent."

I have made these liberal extracts for the purpose of showing, first, on what slight facts and circumstances so strong an opinion was based, and next, that in view of the fact hereafter mentioned, the authority of the case (at least to the extent expressed in that opinion), is questionable. It was decided in 1812, and was reviewed in 1825, in a subsequent case in the same court (*Thomas v. Commonwealth*, 2 *Virginia Cases*, 479), which, so far as I have discovered, has been overlooked, or, at all events, does not appear to have been noticed in the subsequent consideration of the question.

That was a case of manslaughter. The prisoner was found guilty, and a motion was subsequently made to set the verdict aside, on the ground of misconduct in the jury while in charge of a deputy sheriff, which was denied. After judgment, an application for a writ of error was made and refused. It appeared on that application that the examination of the witnesses having been protracted to a late hour of the first day of the trial, and the attorney of the commonwealth being unable, from defect of sight, to proceed further, the jury were, with the consent of the prisoner, committed to two deputy sheriffs attending court, who were sworn to keep them together without separation, and without communication with any other person, or with the officers themselves, except on occasion of *indispensable necessity*; and a charge to the like effect was given to the jury. The court then adjourned to the following day, and the jury were confined in the court house. Some time thereafter, one juror, attended by an officer, went to the stable ad-

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joining the court house to have his horse fed. The next morning he did the same thing, then went to a store in the vicinity, and bought a small article. He also sent a message to his wife, explaining the cause of his detention. Two other jurors were permitted, at night, to go to the bar of the tavern in the neighborhood. One of them drank a glass of brandy and water, and the other a glass of wine. On the next morning the same jurors were again permitted to go to the tavern, and one of them, while there, drank a small glass of julep. Another juror was allowed to separate from the rest to take care of his own horse and that of a fellow juror, and was gone about ten minutes. These different transactions were done in the sight of and near the sheriff.

The case of McCaul above referred to, was relied on in support of the motion, and Dade, J., in delivering the opinion of the court on its denial, said: "The court could not consider that the rule established in that case, that a separation of the jury without imperious necessity will vitiate the verdict, is to be taken in a sense as exclusive as the words import, but should be understood in reference to the case in hand, according to a sound remark of Lord Ellenborough, in *Doe v. Guy* (3 *East's R.*, 21), "that general language used by the court in giving its opinions in any case, must always be understood with reference to the subject matter before them," and concludes with the following remark: "In McCaul's case there was the utmost facility of corrupting the jury, and in the latter (the case then under consideration), a bare possibility; and on account of a remote possibility, we do not feel ourselves justified to obstruct the justice of the country, where we cannot doubt that the prisoner has received no injury."

In this State, the general opinion, since the decisions in *The People v. Douglas* (4 *Cow.*, 26), and *The People v. Ransom* (7 *Wend.*, 417), until questioned by Justice Selden, in *Eastwood v. The People*, *supra*, has been, that the mere separation of a jury, although in a capital case, would not of itself be sufficient cause for setting aside the verdict.

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After an expression of dissent by that eminent jurist (although not necessarily affecting the result in the case at bar), the question is considered of sufficient importance to justify a short review of the different cases, and, with an unfeigned respect for his opinion, it does not appear to me to be justified by the authority of the case relied on by him.

His conclusion is based on what is stated by him to be a direct decision of the Supreme Court, confirmed, as he claims, by a reference to it by Chief Justice Spencer, in his opinion in *The People v. McKay* (18 Johns., 212), decided in 1820. The only evidence of such decision is contained in that opinion where, *arguendo*, the judge makes the following remarks: "A case analogous in principle occurred in Ontario county, in 1814. A woman of color was indicted and tried for murder, and found guilty. The jury had separated *after agreeing* on their verdict, and before they came into court, and on that ground a new trial was granted, and she was tried again."

There is nothing to show what causes led to the separation, or under what circumstances it took place. It may have been an act of great abuse, produced by improper means and with corrupt practice. It was certainly, from the naked facts stated, a gross violation of duty. The case had been submitted for their consideration, and the life of the prisoner was dependent on the result of their deliberation. According to the well established rules, they were to be kept together until they had agreed on and returned their verdict. Their separation after such directions, evinced a disregard of their obligation of duty, and was an act so unprecedented—as well to have justified a conclusion by the court, independent of any other circumstances—that their action was not only inconsistent with a proper administration of justice, and contrary to their duty to the court, but was of itself evidence of such improper conduct as at least to justify a reasonable suspicion of abuse. The question under consideration by the learned justice, when making the remark above quoted, was whether a new trial could be awarded for a capital felony, where the judgment had been arrested, and the case referred to was cited as an authority in support of that

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position, and cannot with propriety be extended beyond the principle for which it was cited.

The cases of *The People v. Douglas* (4 Cow., 26), *The People v. Ransom* (7 Wend., 417), must therefore be considered as unaffected by the decision in *Eastwood v. The People*.

The effect of a separation of jurors, in a capital case, was one of the questions involved in *The People v. Douglas*, although it is true that the judges, in granting a new trial, placed their decision on the ground that they had been guilty of improper conduct in drinking ardent spirits.

An opinion deliberately expressed on the main question is not to be considered an *obiter dictum* merely, but is entitled to consideration as authority. So considered, the case of *The People v. Douglas* sustains the doctrine clearly and distinctly in the opinion delivered by Judge Woodworth, that a mere separation of a jury, without further abuse, although in a capital case, would not of itself be sufficient cause for setting aside a verdict, and is fully and expressly recognized as an authority for that position in *The People v. Ransom*, by Justice Sutherland, although it is suggested by Justice Selden, in his opinion above referred to, that he could only "be considered as having given a *quasi* assent" to it, while concurring in the result of the opinion expressed by Judge Woodworth.

It is also to be remarked, that in the great majority of cases (and indeed there are very few exceptions) where the question has been presented, the courts have placed their decisions in setting aside verdicts and granting new trials, on the ground of abuse, and not in the mere fact of separation, a circumstance of itself an authority against the sufficiency of the latter ground. If that was sufficient, it would have been unnecessary to have considered the question of abuse at all. The result therefore is, that the weight of authority is decidedly in favor of the power of the court to permit a separation in all felonies without any exceptions. If, however, there could have been doubt on the question, considered as one to be governed by the authority of judicial decisions, it appears to be entirely removed in this State by a positive statute, which declares that

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"the proceedings prescribed by law in civil cases, in respect to the impanelling of jurors, *the keeping them together*, and the manner of rendering their verdict, shall be had upon the trial of indictments." (2 R. S., 735, § 14.) The provision is general, and without any qualification or restriction whatever. That statute was passed several years after the case of *The People v. Douglas* was decided, and, it is to be assumed, with full knowledge of it, and the authorities cited in that case, including that of *The Commonwealth v. McCaul*.

The power of the court to permit a separation in civil cases, is undoubted, and it is constantly exercised, and had been long previous to the passage of that statute.

It is also conceded to be the rule, that the party who seeks to avoid a verdict in a civil case, on the ground that a jury have separated, whether such separation was with or without the authority of the court, must show, affirmatively, that the separation has, or may probably have had, some effect on the verdict (*Eastwood v. The People, supra*), and that the rule is the same in cases of misdemeanor, is abundantly settled in this country and in England. (*Ib.*)

As the same rule prescribed by law in civil cases, in respect to keeping jurors together, apply to the trials of indictments, and as the trial of indictments for all offences, without reference to their grade, is placed on the same footing and subject to the same regulations, there can be no foundation for the distinction sought to be made in capital cases, even if there were formerly a ground for such a distinction. Nor is there any reason in principle for it. The object of trials by a jury in all cases is the same. It is to ascertain the truth. That is always the same. "The principles of justice are immutable and eternal." If a fair and impartial verdict can be obtained in one case after the jurors have separated and gone to their homes, or mixed with their fellow citizens, what foundation is there for the assumption that it cannot be in another? and what reason can be assigned for sustaining a verdict in a case of a misdemeanor, when it could, upon the same state of facts, be set aside in a case of felony? The ground on which the dis-

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tion has been based is erroneous. It assumes that the tribunal, which is chosen to determine between the public and the citizen on questions affecting the life and liberty of the citizen, is corrupt, or, at all events, is in danger of being influenced by fraud and corrupt practices. Such a doctrine is repugnant to all ideas of a fair and just administration of the laws of the land, and strikes at the very existence of all our civil rights.

Sentiments were expressed in *Thomas v. The Commonwealth* (*supra*), in reference to officers having the custody of jurors, which may, with the same justice in the present day, without disrespect to such officers, be extended to jurors. He says: "Towards the officers of the law we are not warranted in extending a suspicion of corruption, for if we were to do so, he having many opportunities of corruption, there would be an end to all confidence in many of the most important proceedings in a court of justice;" and Justice Read, in *Davis v. The State*, in maintaining the right of the court in its exercise of a sound discretion to permit a jury to disperse during the progress of the trial, remarks, that "jurors are now considered as honest men, disposed to discharge the obligations of their oaths and justice, and it is not going very far to presume that they would resist all efforts to corrupt them, as much as a sworn constable."

The jurors, according to the usual practice in this State, are summoned several days previous to the time designated for holding the courts at which they are required to attend, from a select class of men, specially chosen by public officers designated for that purpose, and are required to be men of known competency, character and integrity, and possessed of property to a prescribed amount. This practice, while it is calculated on the one hand to secure the attendance of honest, fair and competent jurors, on the other hand affords the time and opportunity, both in civil and criminal cases, for tampering with them, and for corrupt appliances to a much greater extent, and with better prospects of success than during the short time usually allowed for obtaining refreshments, or during the ad-

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jourment from day to day. I may add that in a business community, the continuance of a jury together for the time the case in question occupied, would materially tend to a derangement of business and actual loss, and that a separation under such circumstances, as well as in counties where the means of accommodating jurors are limited, if attainable at all, would be justified as a case of "evident necessity" fairly within the exceptions to the rule laid down by Blackstone. It might be urged, and in my opinion shown, that the danger growing out of the practice in keeping a jury together, with the inhibitions against talking on the subject of the trial only, while free conversation on other subjects, as well as a transmission of letters, and free access to the newspapers and various publications of the day are tolerated, is far greater than by allowing them to go at large during the adjournment, and attending to their business and domestic avocations; but I deem it unnecessary to discuss this branch of the case further, and conclude with the remark, in the language of the court in *State v. Engel (supra)*, that in our day there is no necessity for adhering with tenacity to the doctrines of ancient times. Many of the notions in vogue centuries ago, have yielded to better reason, founded on more enlightened views and greater experience.

Having come to the conclusion that it was in the power of the court, on its own authority, to permit the jury to separate on the different adjournments during the progress of the trial, it is not material to express our opinion at length on the effect of the consent given by the prisoner to such separations. If it was ineffectual, it cannot vitiate or impair the order of the court authorizing it. I will merely say that I have not seen any reason to doubt the justice of the rule as laid down by Cowen, J., in the case of *The People v. Rathbun* (21 Wend., 542, &c.), that a prisoner "may waive any matter of form or substance, excepting only what relates to the jurisdiction of the court," and that "any agreement deliberately made, any plain assent, express or implied, in respect to the orderly conduct of a suit, or even an agreement to admit a material fact,

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upon the trial, cannot be revoked at the pleasure of the party," "that even in respect to a trial for felony, the principle is the same as that which binds in civil cases, and that a prisoner on trial in the Courts of Oyer and Terminer," "who defends by counsel and silently acquiesces in what they agree to, is bound the same as any other principal by the acts of his agent." The obligation of this rule was subsequently enforced in *Beebe v. The People* (5 Hill, 32), where the court refused to allow the withdrawal of a consent given with the approbation of the court, and remarked, that "in respect to the delay of the trial (caused by such consent), and the separation of the jury in the meantime, it is not for the prisoner to take advantage of the irregularity, if it be such, as the indulgence was granted on his application and for his benefit," although if improper conduct by any of the jurors had been shown, they would have felt it their duty to interfere and quash the proceedings.

Some other questions were raised, although not discussed at length on the argument, which I will proceed to consider. One was that two of the jurors had been guilty of misbehavior in holding a conversation with Dr. Doremus, a material witness, who had been examined on the part of the prosecution, in the court room, in relation to his testimony. This charge is founded on the affidavit of one witness only, and that under circumstances not entitling it to much credit. While he undertakes to state so much of the remarks of the Doctor as tend to show an impropriety of conduct on his part, he says that he did not hear the remainder of the conversation.

The remark stated to have been made by the juror was in relation to a fact which, I think, from the case, it is apparent, admitted of no difference of opinion, and therefore could not prejudice the prisoner. The charge is, however, fully denied by both of the jurors implicated, as well as by the Doctor. There was, therefore, no ground for setting aside the verdict on that account. The refusal of the court to issue an attachment against the witness Stephens, on the application of the prisoner's counsel, does not affect the verdict or judgment, and is not available as a ground of reversal here, for the following,

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among other reasons: First, The testimony on both sides had been closed, and the court had so announced, and had directed the summing up to proceed. Second, Arrangements had been made by all parties for summing up, which was inconsistent with the introduction of additional testimony. Third, There is nothing in the affidavit, nor in the case, to show that the attachment was applied for with the object of having the witness examined, and no application was made for a delay or postponement of the trial till the return of the attachment. Fourth, If there had been, the examination of the witness at that stage of the case, rested in the discretion of the court.

It was also objected that the record does not show that the prisoner was present in court during the whole of the trial, nor at the rendition of the verdict. In reference to which, it is to be remarked that it is distinctly stated in the record itself that he was personally present on the impanneling of the jury, and when judgment was rendered; it is also shown by the return to the *certiorari*, that the jurors were polled on giving their verdict, and that the prisoner was present on every day of the trial previous to that time. There is, therefore, no valid ground for that objection.

Several exceptions to the rejection and admission of evidence were taken, which will now briefly be considered.

Assuming that those taken to the decisions made as to the exclusion of the papers before Justice Welsh, and as to the questions put to the witness, John Pullman, were well taken at the time they were taken, the objections were obviated by the subsequent introduction of those papers, and by the offer of the District Attorney, made while the witness Pullman was still in court, and before the defence closed their case, that every question that had been propounded by the defence to him, but which had been excluded by the court, might be put to the witness, and answered by him.

The testimony of Fanny Bell, in relation to the liquids taken by the deceased, and as to the effects of the rice on the witness, was pertinent to the main issue. The question as to the nature of the conversation between that witness and the deceased,

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might have elicited an answer, which, in connection with other testimony, might have been pertinent when put; but if it were otherwise, the answer given to it was immaterial and harmless.

Doctor Finnell, a witness examined on the part of the defence, was asked whether certain symptoms, particularly specified, were symptoms of arsenical poisoning, and he was permitted to answer the question. This was admissible; he had previously given testimony in relation to the same subject matter, and the question put referred to symptoms of which evidence by other witnesses had been previously given, his opinion as a physician was therefore properly asked and admitted. (*See 1 Park. Cr. R.*, 495; *2 Kern.*, 358, &c.)

The testimony of Jane Harvey was admissible to rebut that of Susan Hannah, Isabella Bennett and Maria Hannah, given on behalf of the prisoner, on their direct examination; and that of Michael Thornton and John Biscoe was also properly received for the same object.

The motion to strike out the testimony of Henry Maxwell and Charles Mulholland was properly overruled. The evidence related to the conduct of the witness Bell, which had been attacked by the defendant, and was therefore admissible; but conceding it to have been immaterial, as is claimed, the refusal to strike it out cannot avail the prisoner here. It had been taken without objection, and it was too late afterward to object to its effect.

The objection taken to the examination of William Knox, was not well founded. The avowed object of the prosecution in calling him, was to rebut the evidence introduced on the defence, which had then been closed. There can be no doubt as to the propriety of admitting him to be examined for that purpose; but if it were otherwise, it was discretionary in the court to permit the examination, and the exercise of that discretion is no valid ground of exception.

The admission of the anonymous letter is no ground of reversal; it was sufficiently proved to have come from the prisoner, and it tended to show a motive for the commission of the crime imputed to him; if, however, it were not strictly

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admissible, no exception was taken to its introduction when produced; and if there had been, all objection to it was removed by the subsequent production of the papers used before Justice Welsh, including the letter in question, by the prisoner himself.

Exceptions taken to the charge, and refusals to charge on certain propositions submitted by the prisoner's counsel, remain to be noticed.

The general exception taken to the charge is clearly unavailable on well-settled rules, and the specific exceptions related to a reference by the judge to certain portions of the evidence, and his comments thereon. The remark, "What will a man give in exchange for his life?" was made a special ground of complaint on the argument; its truth was not denied, but the fact of its being entitled to credit as founded on "the highest authority," was questioned. That is of very little importance, as the truth of the remark itself is conceded. It is suggested, however, by the judge who made it, that it may be satisfactory, and perhaps useful to the counsel by whom the exception was taken, to refer to Matthew 16: 26, in connection with the context in the further examination of the question by him. It is sufficient to say, in answer to all those exceptions, that the comments and remarks of the court on the testimony, are no ground for exceptions; moreover, the jury were expressly instructed that they were the judges of all questions of fact; that if the court had expressed any opinion upon the evidence, or upon any part of it, that they were still to determine for themselves what the evidence was, what weight was to be given to it, and what effect it should have in the case, giving the prisoner the benefit of every reasonable doubt.

The court was requested by the prisoner's counsel to charge on six distinct propositions, and he charged as requested on all except the second, which was slightly modified, and that was charged as modified. The original proposition went so far as to exclude the chemical analysis as evidence, if access to the body of Mrs. Stephens, after it was exhumed, could have been

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had by other persons than those who made the *post-mortem* examination, especially if Robert Bell, one of the witnesses examined on the part of the prosecution, actually had access to and touched it merely, without any further agency or circumstances connected with such access, and that without qualification as to the time.

This is clearly too broad, and a modification of it by saying that if access could have been had by other persons under such circumstances that they could have applied arsenic, and that if Robert Bell actually had such access and tampered with the body then, that so much of the analysis as was made after the body was so exposed and tampered with, was not competent evidence, was unobjectionable.

The motions for a new trial and in arrest of judgment, were founded on matters which have already been considered, and need no further consideration. Our conclusion upon the whole case, after a full examination and deliberate consideration, is, that no ground for a new trial is shown. The judgment of the Oyer and Terminer must, therefore, be affirmed.

NEW YORK OYER AND TERMINER. January, 1860. Before *Ingraham*, Justice of the Supreme Court.

THE PEOPLE *v.* PATRICK TANNAN.

The statute declaring a homicide to be excusable "when committed upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner," is not applicable to a case where the deceased was killed by the prisoner in a fight with fists, and in which the fight was arranged by the prisoner or his friends with his adversary some hours before the fight took place.

Where, in an indictment for murder, it was charged that the death was caused by beating and striking, and the evidence showed that it was probably caused by injuries to the side of the deceased, occasioned by his falling upon a mound of earth when engaged in a personal combat with the prisoner, the prisoner was acquitted by the jury under the advice of the court.

THE defendant was brought to trial on an indictment charging him with the homicide of one Honeyman, in December, 1859, in the city of New York. The defendant possessed a good character for peace, quietness and integrity, while the deceased was proven to have been a man of abandoned character and addicted to ruffianly habits.

The defendant and deceased met at a porter house, when the former charged the latter with having passed counterfeit money. Angry words ensued, and the deceased drew a knife on the defendant, upon which the bystanders interfered, and the parties were separated. On the following day, deceased and his friends sought out defendant, and proposed that he should fight with deceased. Defendant manifested a disposition to avoid the encounter, but upon being pressed, consented to "fight it out." Accordingly, in the morning, it was arranged that the parties should fight at two o'clock in the afternoon, at which time they met in an open lot in First avenue, stripped to the waist, and formed a ring. The parties fought four rounds with their fists. The amount of hitting done by each party was about equal. At the end of each round the defendant fell upon Honeyman with crushing weight, and, in one or two instances, remained there some little time. The prosecution

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admitted that no undue advantage in the combat was taken by the defendant, with the exception of falling on Honeyman. At the end of one or two rounds, Honeyman fell upon his side, hitting a mound of earth.

Honeyman died nine days afterwards. Several physicians testified, that in their opinion death was the result of the injuries received in the fight. Severe injuries were received upon the side, which were sufficient to cause death. The physicians testified that these injuries might have been caused by the deceased falling violently upon a mound of earth.

Henry L. Clinton, for the prisoner, contended that upon the testimony in the case the homicide was excusable, under 2 *R. S.*, § 61, § 4, *sub.* 2, which provides that homicide is excusable when committed "upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner." The combat was forced upon the prisoner. Had he not assented to it, taking into view the character of the deceased as a desperado, he was justified in believing that, if he did not fight the deceased, the latter would perpetrate a murderous attack upon him when he was unprepared.

Mr. Clinton also contended that inasmuch as the indictment charged that the death was caused by beating and striking, and the evidence showed it was probably the result of the falling of the deceased upon a mound of earth, and thereby causing fatal injuries to his side, the jury could not, in any point of view, convict under this indictment. To sustain this point, the counsel cited *Rex v. Kelly*, 1 *Moody's Cr. C.*, 118; *Rex v. Wrigley*, 1 *Lewin. C. C.*, 193; and *Ib.*, 127.

Nelson J. Waterbury (District Attorney), contended that the testimony showed a clear case of manslaughter in the fourth degree.

INGRAHAM, J., charged the jury, that although it appeared from the evidence the prisoner was a man of good character,

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and the deceased was a man of notoriously bad character, yet the bad as well as the good were entitled to the protection of the law. It was for the jury to say, upon the whole evidence, whether the combat was sudden. If the prisoner arranged with his adversary, hours before the fight, that it should take place, or authorized his friends to make such arrangements for him, then clearly it was not a "sudden combat," and the section of the statute cited by prisoner's counsel, did not apply. It was for the jury to say whether the evidence showed that the prisoner made the previous arrangements for the fight, or whether they were made by his friends on his behalf, without his knowledge.

The court also charged, that if it appeared from the evidence that the deceased came to his death from injuries occasioned by falling on a mound of earth, under the indictment, the jury should acquit.

The prisoner was acquitted.

NEW YORK GENERAL SESSIONS. April, 1860. Before *George G. Barnard*, Recorder.

THE PEOPLE v. GEORGE L. WARD.

An order for taking the testimony of a non-resident complainant *de bene esse*, under the acts of 1844 and 1846, entitled in the "Court of General Sessions," before the finding of an indictment thereon for the offence, is irregular, and testimony taken under it cannot be read in evidence on the trial of the indictment.

THE defendant was brought to trial upon an indictment for petit larceny.

John Anthon, Jr. (Assistant District Attorney), after having opened the case, produced a witness who testified that Benjamin Weston, the complainant, was a non-resident at the time

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of the alleged commission of the offence; that he left this State immediately afterwards, and was now absent from the State. The Assistant District Attorney then offered in evidence the deposition of Weston, taken under the act of 1844, chapter 315, page 476, section 11, and the act of 1846, chapter 30, page 408, section 9.

James M. Smith, Jr., and *Henry L. Clinton*, for the defendant, objected, on the ground that the order of the judge, under which the deposition was taken, was wrongly entitled. The order reads as follows:

COURT OF GENERAL SESSIONS.

The People, on complaint of Benjamin Weston, v. George Ward.	}
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On reading the affidavit of Benjamin Weston, and it appearing that George L. Ward is charged with larceny, and that the offence with which the accused, the said George L. Ward stands charged, was committed in the city and county of New York, and that at the time of the commission of said offence Benjamin Weston was, and still is, a non-resident of the said city and county, and that the said Benjamin Weston resides in the State of Maine, on application of the District Attorney ordered, that the testimony of the said Benjamin Weston be taken *de bene esse* before me, at my chambers, No. 11 Chamber street, in the city of New York, on the seventh day of February, instant, at 10 o'clock, A. M. and that the District Attorney cause a copy of this order to be served on the accused forthwith, pursuant to the provisions of the act entitled "An act for the Establishment and Regulation of the Police of the city of New York," passed May 7th, 1844, and an act to amend the same, passed May 13th, 1846; and I do hereby specify two days as the length of notice which shall be given to the accused, of such examination.

Dated New York, February 4th, 1859.

GEORGE G. BARNARD, *Recorder*.

The People v. Budge.

est implication there is to be but one inquisition, *super visum corporis*, and that is to be held "forthwith" on his receiving notice of the death, and being completed it is filed, and the whole proceeding is ended. "As to any original self-moving" power to do anything further in holding an inquest, the coroner is *functus officio*.

This being so, it is clear he has no power to act further on his own motion, and especially while the first inquisition stands. He cannot proceed on surmise or suspicion that some further discoveries may be made. Until the first inquisition is vacated by the action of some court, it is conclusive upon the coroner and all others.

There is no reported case to be found in this country where a second inquisition has been held, the first remaining undischarged, nor is any such practice known to, or recognized, or to be tolerated by the laws of this State. Such a practice would be liable to great abuse, and as the object of the proceeding is merely preliminary, the main purpose being to ascertain whether it is probable that a crime has been committed, and to preserve the evidence and examine the facts and circumstances while they are all fresh and easy of inspection, all the ends of the inquiry are answered by one inquisition, *super visum corporis*, and there is no question made that the first inquisition in this case was not fairly and legally conducted.

There is no danger of a failure of justice in this case if the defendant is discharged on this committal, as proceedings may be taken and an examination had before any magistrate in the county of Lewis, and the proceedings before the coroner form no sort of bar to such an examination, and an original proceeding may be taken to procure an indictment before the first grand jury that shall be impaneled in the county of Lewis. No apprehension is expressed by the counsel of the People, that the defendant will make any attempt to escape, and the opportunities for flight constantly presented to him since these proceedings commenced, and which he has declined to embrace, may be taken as conclusive proof that no such fear need be

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indulged. But whatever speculations may be allowed on this point, it is important to the ends of justice and the safety of the community that inferior ministerial officers should be strictly confined to their legitimate functions, and not overstep those boundaries which the law has prescribed; and whenever this has been done, any court or magistrate having power to supervise the proceeding, fails of its duty if it does not, upon its authority being invoked, instantly interpose to correct an improper, even though it may perhaps be a well-intended, procedure.

The result is that the defendant must be and he is hereby discharged from custody on the warrant under which he now stands committed.

Prisoner discharged.

SUPREME COURT. Clinton General Term, May, 1860. *James, Rosekrans, Potter and Bockes*, Justices.

THE PEOPLE *v.* SUMNER PORTER.

A Court of Sessions has no power to direct a *nolle prosequi* to be entered on an indictment pending therein for an offence not triable in that court.

Nor can a *nolle prosequi* be entered to a part of a count of an indictment, though the court in which it is pending have jurisdiction to try the offence charged.

A *nolle prosequi* may be entered to the whole of an indictment, or to any one or more of several counts in an indictment.

Where a person was indicted in a Court of Sessions for rape, with but one count in the indictment, in the usual form, and the Court of Sessions directed a *nolle prosequi* to be entered for the crime of rape, and the prisoner was tried for an assault only, and convicted, the conviction was reversed, and the prisoner discharged.

THE prisoner was indicted for the crime of rape, at a Court of Sessions held in Hamilton county, in October, 1858. The indictment contained but a single count in the usual form. At

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a subsequent term of said court, held in June, 1859, the prosecuting attorney moved that said indictment be sent to the Fulton county Oyer and Terminer for trial, or that the prisoner be tried for an assault only. The court directed a *nolle prosequi* to be entered for the crime of rape charged in the indictment, and that the prisoner be tried upon the remaining part of the indictment for an assault only. A *nolle prosequi* was entered accordingly, to which the prisoner, by his counsel, duly excepted.

The prisoner was thereupon put upon trial under the said indictment, for an assault. The prisoner, by his counsel, insisted that he was not under indictment for an assault, and that the court had no authority to try him for such an offence. The objection was overruled, the trial proceeded, and the prisoner was convicted.

R. H. Rowe, for the People.

W. Gleason, for the prisoner.

By the Court, JAMES, P. J. It is a constitutional, as well as a statutory provision, that no person can be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury. In this case the grand jury had presented the prisoner for the crime of rape. The indictment contained but a single count charging the crime in the usual form. For the trial of that offence the Court of Sessions had not jurisdiction. (2 R. S., 208, 19 Wend., 192.) That court can only let to bail persons indicted for crimes not triable therein, or where the indictment is found in that court, order it to the Oyer and Terminer for trial. (2 R. S., 209.) It has not authority even to order a *nolle prosequi* to be entered in such a case. This does not conflict with the remark of Cowen, J., in *The People v. Abbott* (19 Wend., 201), that "to warrant a trial at the Sessions, the District Attorney should have entered a *nolle prosequi* on the count for rape." The judge did not say when or where the *nolle prosequi* should be entered. If

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sent to the Oyer and Terminer, as the statute requires, and the indictment contained separate counts for rape and assault, a *nolle prosequi* might be then entered on the count for rape, and then the cause returned to the Sessions for trial. That indictment contained counts for rape and for an assault, and what the learned judge intended, was to show that such an indictment was not triable at the Sessions, unless the counts for the higher offence were stricken out. The Court of Sessions having no power to direct a *nolle prosequi* in this case, its entry was a nullity, and the trial on the indictment was without authority and void.

But admitting the court had authority to direct a *nolle prosequi* on an indictment for an offence not triable therein, it should be to the whole count, and could not be to a part of a single count, so as to change the nature, character or degree of the sole offence charged by the grand jury. The entry on the record of a *nolle prosequi* is an act by which the prosecution declares it will proceed no further with the indictment, or with that part of it specified in the order. Its effect is to put the prisoner without day to such part, and, if to the whole, entitles him to a discharge from arrest, unless held for re-indictment, as the entry does not operate as an acquittal.

As I have before said, a *nolle prosequi* may be to the whole indictment, or to the whole of any one or more of several counts, but cannot be to a part of any one count; therefore, when a *nolle prosequi* is entered to a part of an indictment containing a single count, it operates upon the whole indictment, and entitles the prisoner to his discharge, unless held for further indictment. In this view of the case, the court proceeded in the trial without authority.

The conviction should be set aside, and the prisoner discharged.

SUPREME COURT. Clinton General Term. May, 1860. *James, Rosekrans, Potter and Bockes*, Justices.

JOHN GRANT, plaintiff in error, *v.* THE PEOPLE, defendant in error.

The return to a writ of error in a criminal case, brings up the indictment, the pleas interposed by the defendant, and the trial and judgment upon those pleas, as well as the bill of exceptions. On such a return, therefore, a special plea of a former trial on the same indictment, and the proceedings on such plea are properly before the court for review.

After the impanneling of a jury in a criminal case, its arbitrary discharge, without any cause, and where no circumstances exist calling for the exercise of the discretion of the court, is a bar to a subsequent trial of the defendant upon the same indictment.

The issue joined upon a special plea of a former trial, can only be tried by a jury; the consent of the defendant cannot confer jurisdiction upon the court to try the issue without a jury.

Form of an indictment for the statutory offence of seduction under promise of marriage.

THIS case came up on a writ of error to the Court of Sessions of St. Lawrence county, where the plaintiff in error was arraigned upon an indictment in the following words:

State of New York, County of St. Lawrence, ss :

At a Court of Oyer and Terminer, held at the Court House, in the town of Canton, in and for the county of St. Lawrence, on the 15th day of February, in the year of our Lord, one thousand eight hundred and fifty-nine, before the Honorable Amaziah B. James, Justice of the Supreme Court, William C. Brown, County Judge, and Joseph Barnes and Silas Baldwin, Esquires, Justices of the Peace of said county, assigned to inquire by the oath of good and lawful men of said county, of all crimes and misdemeanors committed or triable in said county, and to hear, try, determine and punish all offenders according to law.

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St. Lawrence County, ss :

The Jurors of the People of the State of New York, in and for the body of the county of St. Lawrence, to wit : Elihu M. Dana, &c., &c., good and lawful men of said county, now here sworn and charged to inquire for the said People, in and for the body of the said county, upon their oath do present :

That John Grant, late of the town of Norfolk, in the county of St. Lawrence, heretofore, to wit, on the 20th day of July, in the year of our Lord one thousand eight hundred and fifty-eight; at the town of Norfolk, in the county of St. Lawrence, unlawfully, willfully and feloniously, under and by means of promise of marriage, did seduce and have illicit sexual intercourse and connection with one Ruth Amelia Rose, she, the said Ruth Amelia, then and there, being an unmarried female of previous chaste character, against the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oaths, do further present; That heretofore, to wit, on the 20th day of July, in the year 1858, at the town of Norfolk, in said county of St. Lawrence, the said John Grant undertook and promised to, and with one Ruth Amelia Rose, who was then and there an unmarried female of marriageable age and condition, to marry her, the said Ruth Amelia, whenever he, the said John, should be thereunto afterward requested, and mutual promises of marriage were then and there made and entered into by and between the said John and the said Ruth Amelia.

And the jurors aforesaid, upon their oaths, do further say : That after making the said promise of marriage by the said John Grant, he, the said John Grant, under and by means of his said promise of marriage, willfully and feloniously did seduce and have illicit connection with the said Ruth Amelia Rose, she, the said Ruth Amelia, being then and there an unmarried female of previous chaste character, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York.

THOMAS V. RUSSELL, *District Attorney.*

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Thereupon the counsel for the plaintiff in error interposed the following plea, to wit:

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And the said John Grant comes and says, that no further proceedings in the premises ought to be had or taken against him on the said indictment, because he says, that on the first day of September, instant, in the Court of Sessions in said county, the said defendant was put upon his trial upon said indictment, and a jury between the People and the said defendant, upon the said indictment, was in due form of law drawn, impaneled, charged and sworn to well and truly try the said issue. And the said jury, without the consent of the said defendant, have been discharged and separated without having rendered any verdict therein, and without disagreeing or other special cause, but by mere irregularity, and the said defendant says that he has been once in jeopardy upon the said indictment, and cannot by the law of the land be again tried thereon.

To which said plea on the part and behalf of the said defendant, the District Attorney put in the following reply, to wit:

ST. LAWRENCE SESSIONS.

The People	}
<i>vs.</i>	
John Grant.	

The People of the State of New York, by Thomas V. Russell, District Attorney, for the county of St. Lawrence, come and reply to the special plea in bar of the said defendant, and say that said jury was not discharged by the court, in case of the said John; that immediately after the impaneling of the jury in said plea mentioned, and before any further proceedings were had, and before any evidence was given to the said jury, at the special instance and request of the said defendant

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made in open court, the said jury were allowed by the said court to separate and go without the Court House.

Issue being thus joined upon said defendant's said special plea, the counsel for the defendant proposed and requested that this issue upon the special plea in bar should be tried by the court without jury, and the court proceeded to try said issue, and upon such issue gave judgment for the People, and ordered the indictment to be tried before a jury.

The trial then proceeded before a jury, and the plaintiff in error was convicted and sentenced to two years' imprisonment in the State Prison.

William H. Sawyer, for plaintiff in error, cited *People v. Meany*, 4 Johns. R., 294; 2 R. S., 5th ed., 718, 1026; *People v. Cancemi*, 18 N. Y. R., 134; 4 Black. Com., 349; *Const. of N. Y.*, arts. 1, 2; *Pfefer v. Com.*, 3 Harris, 465; *Com. v. McCull*, 1 Va. Cas., 371; *McLain v. State*, 10 Yerg., 529; *People v. McKay*, 18 Johns. R., 218.

Thomas V. Russell (District Attorney), for the People.

I. So much of the bill of exceptions in this case as relates to the proceedings in the court of Sessions, on the defendant's special plea in bar, ought to be stricken out and disregarded. All that matter is improperly incorporated into the bill.

The office of a bill of exceptions is confined to bringing up for review questions of law raised and decided on the trial of the *main issue*.

It does not extend to such questions as arise on the trial of preliminary or collateral matters. (*People v. Stockham*, 1 Park. 426; 2 R. S., 736, § 21; *People v. Freeman*, 4 Denio, 21; *People v. Wynehamer*, 2 Park., 382.)

II. In order to have brought that collateral issue in any way into the case, the defendant should have demanded to have the issue raised on his special plea, tried by the jury, like any other issue of fact, but at the *defendant's especial request*, this collateral issue was submitted to the court, and whether the

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decision was right or wrong, it is not a subject for review by this court on writ of error.

III. But if this court can, upon this bill of exceptions, review the decision of the Court of Sessions, on that collateral issue, it is submitted that no error was committed by the Sessions, because,

1. The suspending of the trial of the defendant after the jury had been impaneled, for the purpose of first trying another defendant, was by this defendant's express consent, which led necessarily to the separation of the jury over night, and his consent waives the irregularity, if there was any.

This was a matter as to which the prisoner's consent was binding upon, and cannot be revoked or repudiated, as in *Cancemi's* case.

2. In cases not capital, the separation of the jury, *without* the prisoner's consent, is a matter within the discretion of the court. (*People v. Eastwood*, 3 Park., 28, and cases there cited.)

The mere fact of separation of the jury furnishes of itself no proof of misbehavior on their part (*People v. Douglass*, 4 Cow., 26), and no misbehavior was alleged in this instance.

The true meaning of the maxim embodied in the Constitution of this State—"no man shall be subject to be twice *put in jeopardy*, for the same offence,"—is that no man shall be twice *tried* for the same offence and a verdict rendered.

No evidence will support a plea of "once in jeopardy" which will not support a plea of "*autrefois acquit*," or "*autrefois convict*." That is the test. (*Arch.*, vol. 1, p. 111, and note.)

ROSEKRANS, J. The return to the writ of error necessarily brings up the indictment, and the pleas interposed by the defendant, the trial and judgment upon those pleas, together with the bill of exceptions. The objection on the part of the People to so much of the bill of exceptions as relates to the defendant's special plea and the proceedings thereon, is therefore not well taken.

This special plea alleges, that on the first day of September, 1859, the defendant was put upon his trial upon the indict-

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ment, and a jury was drawn, impaneled and sworn to try the issue between the People and the defendant, and that said jury, *without the consent of the defendant, had been discharged and separated without rendering any verdict, and without disagreeing or other special cause, but by mere irregularity*, and that the defendant had once been put in jeopardy upon the indictment, and could not be again tried. The reply to this plea, as amended, denied that the jury had been discharged, and alleged that they separated immediately after being impaneled, and before any evidence was given, *at the request of the defendant*.

If the facts alleged in the special plea are true, there can be no doubt, under the decisions in our own courts and elsewhere, that the defendant cannot be tried upon the indictment. The earlier cases upon the question whether the court had the power to withdraw a juror or to discharge a jury in a criminal case, were reviewed by Kent, Justice, in the case of *The People v. Olcott* (2 J. Cas., 301), and it was held that the power existed, but that it could only be exercised in cases *where it was necessary for the proper administration of justice*, and that this necessity must be determined by the court upon a consideration of all the circumstances attending the case. The same question was considered in the case of *The People v. Goodwin* (18 J. R., 187), and Spencer, Ch. J., in that case said: "Upon full consideration, I am of the opinion that, although the power of discharging a jury is a delicate and highly important trust, *yet that it does exist in cases of extreme and absolute necessity*, and that it may be exercised without operating as an acquittal of the defendant, that it extends as well to felonies as misdemeanors, and that it exists and may discreetly be exercised in cases where the jury, from the length of time they have been considering the case and their inability to agree, may be fairly presumed as never likely to agree unless compelled so to do from the pressing calls of famine or bodily exhaustion." In *The People v. Barrett* (2 Caines' R., 308), Livingston, J., says: "The power (of withdrawing a juror in criminal cases) should not be lightly used, but confined as much as may be to cases of *very urgent necessity*, where, by the act of God, or by some

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sudden and unforeseen accident, it is impossible to proceed without manifest injustice to the public or the defendant." And in *The United States v. Perez*, it was held that "the law has invested courts of justice with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration, *there is a manifest necessity for the act*, or the ends of public justice would otherwise be defeated." In *The People v. Green* (13 Wend. R., 55, 57), it was held that when it is admitted that the court has the power to discharge, and that the time when the power ought to be exercised rests in the discretion of the court, a case is presented in which, if the power has not been discreetly exercised, there can be no remedy by writ of error. (*See also M. C. Newton's Case*, 66 E. C. L. R., 716.) In the case now before us, the special plea excludes the existence of any necessity, and all grounds for the exercise of the discretion of the court. It alleges that the jury was "discharged without disagreeing or other special cause, but by mere irregularity," and that this was done without the consent of the defendant. In *Mahala v. The State* (10 Yerg. R., 582), the Supreme Court of Tennessee held that there was no power to discharge a jury in a criminal case without the consent of the defendant, except in cases of manifest necessity. When the jury are unwarrantably discharged, it is equivalent to an acquittal. The law, to warrant the discharge of the jury, must be one of uncontrollable emergency. (*The State v. Waterhouse, Mart. & Yerg. R.*, 278.) The English cases are all cited in the case of *Mary Catharine Newton* (66 E. C. L. R., 716, *supra*). The arbitrary discharge of a jury in a criminal case, against the consent of a defendant, without any cause, and where no circumstances exist calling for the exercise of the discretion of the court (which is the case presented by the special plea of the defendant), is a bar to a subsequent trial of the defendant upon the same indictment. (*Commonwealth v. Cook*, 6 Searg. & Rawle, 577; *State v. Ephraim*, 2 Dev. & Bat., 162; 2 Gr. & Wat. on New Trials, 105, 106, and folios and notes.) In the case of *The United States v. Pedro Gibert* (2 Sumn. R., 60), Mr. Justice Story approves of

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the doctrine of the Supreme Court of Pennsylvania and North Carolina, which hold that the provision of the Constitution of the United States, which declares that no person shall be subject for the same offence to be twice put in jeopardy of life or limb, includes cases where a party is once put upon his trial before the jury, and they are discharged from giving a verdict without extreme necessity, and he adds: "This, too, is the clear, determinate and well settled doctrine of the common law, acting upon the same principle as a fundamental rule of criminal jurisprudence." The clause of the Constitution referred to, has been held to extend to all felonies. (*People v. Godwin, supra*, 18 *J. R.*, 201.)

The issue joined upon the defendant's plea could only be tried by a jury. The consent of the defendant could not confer jurisdiction upon the court to try the issue without a jury. This was held in the case of *Cancemi v. The People* (18 *N. Y. R.*, 129, 135, 137), upon the ground that the State has an interest in the preservation of the liberty of its citizens, and will not allow it to be taken away except by due process of law, and that the trial of an issue joined upon an indictment, must be by the tribunal and in the mode prescribed by the Constitution and laws, without essential change. The defendant, therefore, has not been legally tried upon his special plea, and the judgment against him should be reversed, and a new trial ordered before the Sessions of St. Lawrence county, to which court the case is remitted.

Ordered accordingly.

SUPREME COURT. New York General Term, October, 1859. *Roosevelt, Clerke and Sutherland*, Justices.

FELIX SANCHEZ, plaintiff in error, *v.* THE PEOPLE, defendants in error.

In an indictment for murder, it was charged that the mortal wound was given by stabbing with a sword "in and upon the body" of the deceased: *Held*, sufficient, without specifying the part of the body upon which the wound was inflicted.

Where the indictment alleged that the deceased was killed by "one mortal wound;" and the proof showed that two were given, the variance was held to be immaterial.

On the trial of a challenge for favor, the person challenged as a juror testified that he "had read part of the statements in the papers at the time of the homicide, and had formed a preconceived idea in regard to the prisoner's guilt or innocence; that he had no bias one way or the other; that his preconceived idea or impression would in no way influence his verdict, but would be governed entirely by the evidence produced on the stand." He was adjudged to be a competent juror.

It is not competent for a party calling a witness, to ask him whether he had not previously made a certain statement on oath before the coroner's inquest, the alleged statement being repeated in the question, and differing from the testimony of the witness on the trial.

On the trial of an indictment charging the prisoner with the murder of his father-in-law, it was proposed, in behalf of the prisoner, to prove that communications had been made to him, at some time before the alleged murder, notifying him of the infidelity of his wife, which evidence was offered for the purpose of authorizing the inference that the act was committed under the influence of an "insane frenzy:" *Held*, that the evidence was incompetent, and was properly excluded.

Homicidal mania and its exciting causes and premonitory symptoms described by physicians.

THE prisoner was indicted for the murder of Harmon Curnon. The indictment contained one count, charging "that the said Felix Sanchez, with a certain sword, which he, the said Felix Sanchez, in his right hand then and there had and held, the said Harmon Curnon, in and upon the body of him, the said Harmon Curnon, then and there willfully and feloniously, and of his malice aforethought, did stab, cut and wound; giving unto the said Harmon Curnon, then and there, with the sword afore-

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said, in and upon *the body* of him, the said Harmon Curnon, *one* mortal wound of the breadth of one inch, and of the depth of three inches, of which said mortal wound he, the said Harmon Curnon, at the ward, city and county aforesaid, then and there instantly died."

The prisoner pleaded "not guilty," and the issue thus joined was tried at a Court of General Sessions in the city of New York, before *Abraham D. Russell*, City Judge, in June, 1859.

After several jurors had been called, and either sworn to try the cause, or set aside upon challenges for principal cause, or for favor by the prisoner, John S. Tuthill was called as a juror, and appeared, and was challenged for principal cause on the part of the prisoner, and the challenge denied by the counsel for the People; the said John S. Tuthill having been sworn to testify the truth as to his competency as a juror, testified that he had not formed or expressed any opinion as to the guilt or innocence of the accused, whereupon the challenge for principal cause was overruled. The counsel for the prisoner then challenged him for favor, and it was agreed by and between the counsel for the prisoner and the counsel for the People, that the court should act as trier. The said John S. Tuthill thereupon testified that he had read part of the statements in the papers at the time of the homicide, and had formed a preconceived idea in regard to the prisoner's guilt or innocence; that he had no bias one way or the other; that his preconceived idea or impression would in no way influence his verdict, but would be governed entirely by the evidence produced on the stand. The court found said challenge for favor untrue, and overruled the same, to which decision the counsel for the prisoner excepted.

The following are the principal facts proved in the case:

The prisoner was married to the daughter of the deceased on the 18th of November, 1858. They boarded for five weeks after the marriage, with Mrs. Petrona Saunders, in Grand street, New York, and afterwards with the family of the deceased. On the afternoon of January 4th, 1859, the prisoner went to Mrs. Saunders, and procured a sword-cane he had left at her

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house. He pulled out the sword and rolled it up in paper, and took the cane in his hand, saying he was going to have it fixed in Laurens street. On the evening of January 5th, the prisoner and his wife took tea at home, and then went to the house of Mrs. Saunders. They arrived there between six and seven, and soon afterwards the prisoner went out, leaving his wife there. He returned at half-past ten, and after a short time left with his wife; they arrived home at about that time; they went in at the basement door, into the kitchen, where part of the family of the deceased were together; the prisoner's wife went immediately up stairs, and the prisoner followed her in five minutes afterwards; the deceased came in soon afterwards with some apples, which his niece, Maria Johnson, put on a plate and took up stairs to a room occupied by the deceased and his wife as a bedroom, which was also used as a parlor; the prisoner and his wife slept in a small room which was entered through that room, and which was lighted from the entry by a small window; the prisoner and his wife, her younger sister Martha, and Maria Johnson, remained together in the parlor until half-past twelve o'clock, singing songs, playing upon the guitar, and eating apples; Maria Johnson and Martha Curnon then returned to the kitchen, where the deceased and his wife were nodding by the fire, the latter having been ironing; and the girls then went up to bed in the attic of the house; the last they heard of the prisoner he was singing and whistling.

About two o'clock the deceased and his wife went up to go to bed, and found the door of their room locked. Mrs. Curnon looked through the entry window into the prisoner's room, and saw him standing there. She asked him three times to open the door, but he made no answer. She then asked her daughter, who was sitting up in bed, to open the door, who replied, "He won't let me." The mother then forced open the door of the outer room, and as she entered it, the prisoner rushed out of the bedroom and stabbed her with the sword he had procured from the house of Mrs. Saunders. His wife then jumped out of bed and escaped up stairs, the prisoner stabbing

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her in the shoulder as she passed. The prisoner then turned upon the deceased, and stabbed him with the sword-cane—the weapon being entirely or partially withdrawn, and immediately pushed in again, so as to make really two wounds together, showing a cruciform cut on the outside. The wounds were such as to cause instantaneous death. The mother also escaped up stairs pursued by the prisoner, and she and the prisoner's wife, and Maria Johnson, fastened themselves in the garret. The prisoner had forced the door partially open, when Martha Curnon, who had gone down stairs during the disturbance, called out from below. The prisoner turned and pursued her, but his light went out, and she hid in the cellar. While there, she heard him say, "Never mind I'll catch you and kill you, and kill myself, too." He remained in the house only some five minutes afterwards, when he left it, went down the alley to the street, slammed the outer gate, returned back into the yard, washed something at the hydrant, and loitered about until near six o'clock in the morning, when he finally left. He escaped from New York, and was subsequently arrested in New Orleans.

When *Annisetto Lajeunechette*, a witness called by the prisoner, was on the stand, the counsel for the prisoner asked him the following question :

Q. Did you at any time after the marriage of Sanchez, give him any information of his wife's infidelity to him; and if so, when?

This question was objected to by the counsel for the People, and the objection sustained, to which decision the prisoner's counsel excepted.

Sarah Jane Sanchez, the wife of the prisoner, was called as a witness in his behalf, by consent of the counsel for the People, and after testifying, among other things, that the prisoner had not accused her of having improper intercourse with *Lajeunechette*, was asked the following question :

Q. Did you not state before the coroner, when examined at the inquest, that "last night" (meaning the morning of January 6th), "My husband accused me of having improper intercourse

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with a man named Annisetto Lajeunechette, and threatened that unless I told the truth he would stab me; he accused me of being a prostitute; I was sitting up in the bed crying at the time; my mother knocked at the door on account of his remarks; I heard her burst in the door?"

This was objected to by the District Attorney, and excluded, and the prisoner's counsel excepted.

Tibulcio Aguillar, a witness called by the defence, testified, that he saw the prisoner, shortly after the homicide, at his store in New York, and conversed with him about the case.

The prisoner's counsel then asked the following question :

Q. "Did he, on that occasion, state to you that he had slept with Mrs. Sanchez on the night of the fifth of January?"

The District Attorney objected, and it was excluded, and the prisoner's counsel excepted.

The prisoner's counsel then asked the following question :

Q. Did you ever communicate to Sanchez statements made by Annisetto, or by any other person, in regard to the infidelity of his wife?

This was also objected to by the District Attorney, and excluded, and an exception taken by the prisoner's counsel.

Benjamin Ogden, M. D., called on the part of the defence, testified as follows :

I have examined the head of Felix Sanchez; there is a small scar on his head, the result of an incised wound made by some blunt instrument; I found some little thickening of the membrane, which shows that the wound is some six or eight months old; I have made the human mind a special study; there is such a thing as *homicidal mania*; it is an affection of the brain, in which the patient, in a frenzied state, has a desire to commit violence on individuals; the exciting causes are violent emotions of the mind; I would classify extreme jealousy as one of these; there are many cases of this kind in the books; there are cases where *homicidal mania* has been developed suddenly, but generally they show some premonitory symptoms; these are, suspicion, jealousy, vascular excitement, fever, red eyes,

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quick pulse, hurried manner; in many cases of insanity, a person's best friends are supposed to be his worst enemies.

On his *cross-examination*, he said: I called at the suggestion of the District Attorney, in company with Dr. Runney; we had interviews of two hours each to examine as to his sanity; the counsel for the prisoner was there at the time; in the course of that examination, I came to the conclusion that he was sane.

Being further examined by the prisoner's counsel, he said: A man who has his reasoning faculties and the control of himself, is sane; I heard the testimony as to the homicide.

Q. Judging from your knowledge of Sanchez's temperament, and the facts and circumstances of this case as you have heard them described in the testimony, do you believe that at the time of the homicide Sanchez was mentally capable of forming a premeditated design to take away life?

A. I can form no opinion; I have doubts on that subject.

Moses H. Runney, M. D., called by the prisoner's counsel, testified as follows: I am resident physician of the Lunatic Asylum at Blackwell's Island; I have heard part of the testimony of Mrs. Sanchez, and of her mother, and of one or two other witnesses; I examined Sanchez on the 6th and 9th of this month, perhaps about three hours; as a general principle, where a homicide has been committed, and it can be determined that there is no motive, I should consider it evidence of *homicidal mania*; but it is extremely difficult to determine the absence of all motive.

Q. Judging from your knowledge of Sanchez's temperament, and from the facts and circumstances of this case, as you have heard them described in the testimony, do you believe that at the time of the homicide he was mentally capable of forming a premeditated design to take away life?

A. It is a difficult point to decide; if the inception of the idea was immediately followed out, there could of course be no premeditation.

Q. Have you doubts as to that subject in this case?

To this question the counsel for the People objected, and the objection being sustained, the counsel for the prisoner excepted.

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The witness being *cross-examined*, testified as follows: Dr. Horwitz was present at the second examination; the prisoner's counsel was also present, and the Assistant District Attorney was there during a part of the time; he remained there until the examination reached a point at which the prisoner's counsel decided to advise his client to answer no further questions in his presence; he then withdrew; on this examination I found nothing to convince me of his insanity; I saw no evidence that he ever had been insane.

The jury found the prisoner *guilty*.

The counsel for the prisoner then moved an arrest of judgment on the following grounds, to wit:

1st. That the indictment does not show upon what part of Harmon Curnon the mortal wound was given.

2d. That there is a variance between the indictment and the evidence; the indictment setting forth but one mortal wound, while the evidence shows that there were two.

The court denied the motion; to which decision the counsel for the prisoner excepted.

Judgment was then pronounced by the court, and the case was brought to this court by writ of error.

William Henry Anthon, for the prisoner.

I. The statute enlarging the jurisdiction of the Court of General Sessions of the Peace of the city and county of New York, provides that in all cases of conviction in said court for a capital offence, or one punishable as a maximum punishment, by imprisonment for life, a writ of error, with a stay of proceedings, shall be a matter of right, and that the appellate court may order a new trial "if it shall be satisfied that the verdict against the prisoner was against the weight of evidence, or against law or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below." (*Sess. L.*, 1855, *ch.*, p. 337, 613.)

II. The indictment is defective in this, that it does not state on *what part* of the body of Harmon Curnon the mortal wound

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was inflicted, and in this, that there were two mortal wounds, instead of one, as stated.

1. Under the Constitution of the State, a party must be indicted before he can be tried for a criminal offence (with certain exceptions); and under the provisions of the Revised Statutes he is entitled to a copy of the indictment. (*Const.*, § 6, *3d R. S.*, 1020, *5th ed.*)

2. The indictment, possession of a copy of which the law deems so essential to the prisoner, must describe the offence charged, in all its essential details, in order that the defendant may clearly understand what he is called upon to answer—may frame his defence accordingly, or may be enabled to plead with accuracy *auterfois acquit* or *auterfois convict*.

3. Where the death was by a wound or stroke, the indictment must show with certainty to what part of the body the violence was applied. (*Hawk. P. C.*, book 2, ch. 23, § 82, p. 178; 2 *Hale P. C.*, 185, 186; 1 *East.*, 342; *Long's case*, 5th Co., 121, cited in *Hawk.*, 178; 1 *Russ. on Cr.*, book 3, § 678, p. 677; 1 *Stark. Cr. Pl.*, 86; 3 *Chitty*, 735; *Whar. on Hom.*, 272; *Arch. C. P.*, 384; *Train & Heard, Prec. of Indict.*, 248; *Whar. Prec., Barb. Cr. L.*, 54.)

4. No omission of any of those circumstances which the law requires to be expressly set forth, can be aided by the conviction of the defendant, and such omission may properly be brought to the notice of the court by a motion in arrest of judgment. (*Hawk. P. C.*, book 2, ch. 23, § 86, p. 179; *Whar. Cr. L.*, § 3043; 2 *Black.*, 270.)

5. The provisions of the Revised Statutes (3 *R. S.*, 5th ed., 1020, § 4), in regard to defects of *form* in indictments, do not meet this case, this being an error of *substance*. This distinction may be clearly seen by examining the cases of errors of form only. (2 *Seld.*, 50; 3 *Park. Cr.*, 380; 2 *Id.*, 208; 8 *Barb.*, 547; 3 *Id.*, 470; 5 *Denio*, 76; 12 *Wend.*, 425.)

III. The court below erred in overruling the challenge for favor, in the case of the juror, John S. Tuthill, and the exception was well taken.

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1. The juror testified that he had read the statements in the papers, and had not formed or expressed an *opinion*, but that he had formed a *preconceived idea* or impression as to the prisoner's guilt or innocence.

2. The fact that he had formed and expressed an *opinion*, would certainly exclude him under the decisions in *Cancemi v. The People* (2 *Smith*, 501), *The People v. Freeman* (4th *Denio*, 9).

3. A preconceived idea or preconceived impression is even stronger than an opinion, according to the best lexicographers. (*Webster* : *Idea*, *impression*, *opinion*.)

4. The existence of a preconceived idea or impression in the mind, denotes a *prejudiced* state of feeling, disqualifying the juror, under the rule laid down in the *Cancemi* case, and at variance with the principle there enunciated: "That the testimony as to the juror's state of mind is to be construed with liberality to the defendant, in the humane spirit which pervades our criminal laws, and the rules of their administration." (*The People v. Cancemi*, 2 *Smith*, 501.)

IV. The court below erred in not allowing the question to be put to Sarah Jane Sanchez as to the facts to which she had testified before the coroner.

1. The witness was the wife of the prisoner, who was examined by consent; it was supposed that she would swear to the same facts to which she had testified before the coroner, and which would have aided the defence by showing the discovery of her adultery, which produced, as is contended, the insane frenzy under which the prisoner acted; instead of which she swore to a state of facts diametrically opposite, thus taking the defence by surprise.

2. It is competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner. (1 *Greenl. Ev.*, 492; 2 *Bull. N. P.*, 297; *Alexander v. Gibson*, 2 *Camp.*, 555; *Lowey v. Jolliffe*, *Wm. Blackst.*, 365; *Richardson v. Allen*, 2 *Stark. R.*, 334; *Ewer v. Ambrose*, 3 *B. & C.*, 746; *Friedlander v. London Ass. Co.*, 4 *B. & Ald.*, 195; *Lawrence v. Barker*, 5 *Wend.*, 305; *Bradley v. Ricardo*, 8 *Bing.*, 57; *Jack-*

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son v. Leek, 12 Wend., 105; Stockton v. Demuth, 7 Watts, 39; Brown v. Bellows, 4 Pick., 179; Rice v. N. Eng. Mar. Ins. Co., 4 Pick., 439.)

3. The subsequent admission of the testimony of the witness before the coroner in evidence, did not cure the error excepted to; if she had been compelled to account upon the stand for the discrepancy between her testimony on the two occasions, it could not have failed to elicit the truth in regard to what took place between her and her husband at the very instant preceding the homicide, which produced the temporary frenzy under which he acted.

4. Without such testimony, forming strictly a part of the very *res gesta*, the case is entirely without evidence showing any cause or motive for the act.

5. The witness had given affirmative declarations injurious to the prisoner, inconsistent with her previous declarations, which were favorable to him.

6. The question was certainly proper, as tending to refresh the recollection of the witness.

V. The court below erred in not allowing the question to be put to Annisetto Lajeunechette as to his informing Sanchez of his wife's infidelity to him.

1. The theory of the defence being that the act was committed in an insane frenzy, which would, at least, reduce the offence from murder to manslaughter, the causes which produced that frenzy, were, properly, matters of evidence in regard to his condition of mind, in the same manner as intoxication, or any other condition of the man depriving him of the power of knowing what he does, may properly be inquired into in reference to the *design* with which the act was perpetrated. (*The People v. Eastwood*, 4 Kern., 562; *Swan v. State*, 4 Humph., 136.)

2. The fact that the prisoner killed the innocent and unfencing father, with whom he had no quarrel, and against whom he bore no malice, affords additional support to the argument, that the act was committed in an insane frenzy, caused by the sudden communication of his wife's infidelity.

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VI. The court below erred in not allowing the question to be put to Tibulcio Aguillar—as to his informing Sanchez of his wife's infidelity to him.

VII. The court below erred in not allowing the question to be put to Tibulcio Aguillar, as to previous statements of facts, made by Annisetto Lajeunechette, differing from those made by him on the stand, by which the defence was taken by surprise.

VIII. The court below erred in not allowing the question to be put to Dr. Ranney, as to his doubts in respect to the prisoner's mental capacity to form a premeditated design to take away life.

1. This was a question involving the prisoner's state of mind at the time of the homicide, and was based as well upon a physiological examination made by the witness as to his mental temperament, as upon the facts of the case. It bears directly upon the question, what effect a strong exciting cause would produce upon his mind, and upon the question, whether the homicide was murder or manslaughter.

2. The witness was an expert, who had made a careful examination as to Sanchez's state of mind, and had heard part of the testimony.

3. It was decided in *The People v. Freeman* (4th Denio), that if there be a doubt as to a prisoner's sanity, he is not in a fit state to be put upon his trial. *A fortiori* then, doubts of experts as to the mental capacity of a prisoner to form a premeditated design at the time of the homicide, ought to go to the jury.

4. The course of examining experts, both as to the results of their own interviews with the prisoner, and upon the testimony evolved in the trial, in respect to the question of insanity, is sanctioned in the following cases: *Lake v. The People*, 1 Park. Cr. R., 495; *The People v. Thurston*, 2 Park. Cr. R., 49; see also the *Answer of the English Judges on this point*, cited in 3 Greenl. on Ev., § 5.

5. The defence had introduced this course of examination, the prosecution making no objection, and it was not competent for the prosecution to interrupt it, after once assenting to it.

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Nelson J. Waterbury (District Attorney), for the People.

1. The test of the sufficiency of an indictment is whether or not it describes the offence charged so as to constitute the crime, as defined by law, and to this end every particular or feature of the crime, as so defined, must be set forth with precision, certainty and consistency, and the whole must fully describe the offence. If this is done so as to present a complete description of the offence, as defined by law, or, in other words, so as to insure "the formality of the indictment," the indictment is good, and neither an omission, in a case of homicide, to allege any of the means by which the crime was accomplished, as, for instance, the manner of holding the weapon, nor any deficiency in the description of the wound, nor a variance between the averments of the indictment and the proof to sustain it, unless by the variance the particular species of the crime proved, though it may nevertheless be of the same general character, differs from that described, or unless the accused is misled thereby, is fatal to a conviction. (*Com. v. Haines*, 6 Penn. Law J., 232.)

1. *Means of death.* If the variance does not show a difference of operations in the means, it is immaterial. Proof of a wound by a sword, or perhaps, in this State, by a pistol, will support an averment of one by a knife; and a blow by a stone, an averment of one by a stick; but an averment of a wound by a stick or stone, will not permit proof of one by a knife or pistol. So, also, proof of death by one kind of poison, will support an averment of a different kind of poison, though proof of death by starving will not support an averment of poisoning. (*R. v. Briggs*, 1 *Moody C. C.*, 322; 2 *Hale P. C.*, 185; 1 *East. P. C.*, 341; 3 *Hawk. P. C.*, 330, § 84, cap. 25; *Arch.*, 484, 485; *Whar. Cr. L.*, §§ 1059-62; 3 *Chitty Cr. L.*, 734-736; 1 *Stark. C. P.*, 91, 92; 1 *B. & B.*, 473; 1 *Russ. on Cr.*, 467; *Rosc. Cr. Ev.*, 577, 578; *People v. Colt*, 3 *Hill*, 432; 5 *Car. & P.*, 128; 7 *Car. & P.*, 788.)

2. *Location of wound.* The widest variance between the indictment and proof, in this respect, is immaterial. The wound

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may be described on one part of the person, and proved to be on an entirely different part. It may be laid as upon the right temple, and proved to be upon the left; or as through the heart, and proved to be through the head. (2 *Hale's P. C.*, 185, 186; 1 *East. P. C.*, 342, 343, § 110; *Arch. P. L.*, 485, 486; *Whar. on Hom.*, 274; *Dias v. State*, 7 *Blackf.*, 22; *Lazier v. Com.*, 10 *Grat.*, 715.)

3. *Dimensions of wound.* These need not be averred at all, but if described, any variance is immaterial. (*Rex v. Mosely*, 1 *Moody C. C.*, 98; *Lex v. Tomlinson*, 6 *C. & P.*, 370; *Lazier v. Com.*, 10 *Grat.*, 708; 1 *Lewin*, 177; *Stone v. State*, 12 *Scammon*, 326; *Bennett & H.*, 58; *Whar. C. L.*, 1069.)

II. The location of the wound is described in the indictment with sufficient precision. It was held in past centuries that the spot where the wound was made must be so described that it could be pointed out from the description by the finger; but this rule has been gradually relaxed in the progress of legal science, until now, in England, by statute, a simple allegation of the fact of the murder is sufficient. (*Waterman's Arch.*, 206.)

III. The use of the word "body," in pleadings, to describe a particular part of the human system, has been fully established by authority and precedents. (*Hawk. P. C.*, cap. 23, § 80; *Long's case*, 5 *Coke R.*, 121; *Chitty's Cr. L.*, 3d vol., 736; *Train & Heard's Prec. of Ind.*, 268; *Rex v. Mosley*, 1 *Moody*, 103; *People v. Restell*, 3 *Hill*, 291; *People v. Stockham*, 1 *Park. C. R.*, 424; *Lake v. People*, 1 *Park. C. R.*, 498, 499; *State v. Bullock*, 13 *Ala.*, 413.)

IV. If the use of the word "body" as the location of the wound, was a demurrable defect, it would be one of form only, and would, especially after verdict, be cured by the statute of jeofails. (2 *R. S.*, 728, § 52; *People v. Powers*, 2 *Seld.*, 50; *People v. Phelps*, 5 *Wend.*, 18-20; *People v. Warner*, 5 *Wend.*, 271; *People v. Rynders*, 12 *Wend.*, 431, 432; *Briggs v. People*, 8 *Barb.*, 550, 551; *People v. Golden*, 3 *Park. C. R.*, 330; *People v. Treadway*, 3 *Barb.*, 470.)

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V. At common law, also, it has been held that a verdict will not be disturbed by reason of an uncertain, or even repugnant statement of the offence in the indictment. (*Penn v. Bell*, *Arch. Pl.*, 486; *Addison*, 168, *et seq.*)

VI. Numbers in indictments are unimportant. Whatever may be alleged, one mortal wound must be proved, and no more is necessary. If two are proved, the case, certainly, is not weakened.

VII. If the objection that two wounds are proven, when only one was alleged, were material, it could not be taken advantage of upon a motion in arrest of judgment, which is founded solely upon the record. (*Rex v. Spiller*, 5 *C. & P.*, 334; *Stone v. People*, 2 *Scam.*, 326.)

VIII. Objections to indictments founded upon a specification in respect to wounds, are only available on a motion to quash. (*Stone v. People*, 2 *Scam.* 326; *Rex v. Spiller*, 5 *C. & P.*, 334.)

COMPETENCY OF JUROR.

I. No exception could properly be taken to the competency of the juror, Tuthill. He had been challenged for principal cause, been found competent, and been so declared, without exception. The challenge for favor being, by consent, tried by the court, and there being no objection to any question put to the juror, the finding of the court, being solely upon a question of fact, was final, and not subject to exception or review. (*Ex parte Vermilyea*, 6 *Cow.*, 555; *People v. Vermilyea*, 7 *Cow.*, 108; *The People v. Bodine*, 1 *Denio*, 308, 309; *Freeman v. The People*, 4 *Denio*, 34.)

II. If an exception was allowable, as upon a question of law, it could not be sustained, for the juror was clearly competent. A "preconceived idea," which the juror subsequently explained to be, as meant by him, synonymous with "impression," but which by proper construction is merely a "notion," does not disqualify. The rule is well settled, that the action of the mind of a proposed juror, must have extended to the formation of an opinion, to render him incompetent. (*People v.*

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Honeyman, 3 *Denio*, 121, *et seq.*; *Freeman v. People*, 4 *Denio*, 34, 35; *Cancemi v. People*, 16 *N. Y. R.*, 504, 505.)

EXCEPTIONS TO EVIDENCE.

I. The exception to the exclusion of the question propounded to the witness, Annisetto Lajeunechette, was not well taken.

1. Testimony in relation to the infidelity of the prisoner's wife, if any were possible, could have no legal bearing upon the question of his guilt in the murder of her father.

2. If proof of a communication to the prisoner, impeaching the fidelity of his wife, could have had any proper influence in determining the grade of the offence for which he was tried, the question should have been limited to a period of time immediately preceding the murder. (*R. v. Fisher*, 8 *Car. & P.*, 182; *R. v. Kily*, 2 *Car & Kir.*, 815.)

II. The refusal of the court to allow the witness, Sarah Jane Sanchez, to be examined on behalf of the prisoner relative to her testimony at the coroner's inquest, was manifestly just and proper.

1. The witness was called and sworn for the prisoner, and no rule is better settled than that a party is not entitled to impeach his own witness by any testimony, having only that object. (*Cow. & Hill's Phil. Ev.*, n. 604, and cases there cited; 1 *Green.*, § 442; *Ewer v. Ambrose*, 3 *Barn. & Cress.*, 749, *et seq.*)

2. The refusal to allow the proposed question, worked no injury to the prisoner, because all the testimony at the coroner's inquest was put in evidence by consent, and if the question had been wrongly excluded, the error would be cured by the fact that the previous evidence of the witness was subsequently read to the jury. (*Stephens v. People*, 19 *N. Y. R.*, 570, 571.)

3. The testimony sought by the question was wholly immaterial to the issue to be tried.

4. If the object of the question was to refresh the recollection of the witness, its allowance was within the discretion of

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the court, and no exception can properly be taken to its exclusion.

III. The question propounded to Dr. Moses H. Ranney was entirely unwarranted, and the exception to its exclusion is not well taken.

1. The question was put upon direct examination, and it was necessary to prove opinions and not doubts. Jurors may have doubts upon the testimony given, but witnesses should not state doubts, or else we might have doubts piled upon doubts.

2. If the opinion of the witness was desired, that could only be asked for upon a given state of facts, and not upon part of the testimony, as heard by him, to which he may have attached a degree of credit which the jury would not, or which he would not, if he heard the whole. (*Lake v. People*, 1 *Park. C. R.*, 495; 3 *Green. Ev.*, § 5; *McNaughton's Case*, 10 *Clark & Fin.*, 210; *Vide* 2 *Green. Ev.*, n. to § 373; 1 *Mood. & Rob.*, 75; *Com. v. Rogers*, 7 *Met.*, 500.)

3. The question was not confined to the matters upon which the witness was an expert, but the subject of it involved both legal and medical science; and therefore the question could not be put in any form unless its scope was restricted.

4. The point as to whether or not a premeditated design to take life, can instantaneously precede a fatal blow, is one of law, and in respect to this, the answer of the witness to the question immediately previous, shows that he was at variance with the Court of Appeals. (*People v. Clark*, 3 *Seld.*, 394.)

IV. The question propounded to the witness Tibulcio Aguilar, was manifestly wrong, and was properly excluded.

1. If the object was to impeach the credibility of the previous witness, Lajeunechette, he was a witness for the prisoner, and it could not be done.

2. If the object was to impeach his testimony, it would have been necessary to lay a foundation by asking Lajeunechette if he had made such a statement. (*Palmer v. Haight*, 2 *Barb.*, 210; *Everson v. Carpenter*, 17 *Wend.*, 429; *Pendleton v. Empire Stone Dressing Co.*, 19 *N. Y. R.*, 13.)

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3. If the object was not to impeach Lajeunechette, the evidence was hearsay, and therefore inadmissible.

4. More especially the virtue of the prisoner's wife was not to be impeached by the braggart boasts of a third party, made to another stranger; and there was not a single word of evidence during the whole trial throwing even a doubt upon her fidelity to him.

5. The evidence sought was, under any circumstances, immaterial to the issue to be tried.

6. If it was material, and otherwise allowable, it could not be proper unless connected with a further statement or other proof that the prisoner had knowledge of the fact previous to the murder.

V. The question proposed to the witness Tibulcio Aguillar, was properly excluded.

1. The testimony sought was entirely hearsay.

2. It was, in any point of view, wholly immaterial to the issue to be tried.

3. If it was material, it would have been necessary to limit any such statements as those sought, to a period of time immediately preceding the murder.

By the Court, ROOSEVELT, J. The prisoner, Sanchez, was convicted, at a Court of Sessions, of the crime of murder, in taking the life of one Curnon, his wife's father, on the 6th of January last, at 154 Sullivan street, in the city of New York, by stabbing him with a sword through the lungs, in a manner which, according to the testimony, must have produced instantaneous death.

Before the execution of the sentence, a writ of error was sued out by the prisoner, to bring the proceedings into the Supreme Court for review, in pursuance of the recent statute in relation to capital convictions in the Court of Sessions of this city, which gives to parties in such cases a right to a new trial, if the Supreme Court shall be satisfied that the verdict was against the weight of evidence or against law, or that jus-

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tice requires a new trial, whether any exception shall have been taken or not in the court below. (*Laws* 1855, 613.)

Several exceptions, however, were specifically taken at the trial, and are still insisted on as grounds for reversal.

It was contended, among other objections, that the indictment was defective in not specifying the part of the body in which the wound was inflicted, and in stating only one wound to have been given, instead of two.

The object of an indictment is to give to the prisoner reasonable notice of the crime with which he is charged, so that he may be enabled to prepare his defence, and also to protect him, if necessary, from a second trial for the same offence, by showing from the record the identity of the two accusations.

This indictment describes the stab as made by a sword "in and upon the body" of Curnon, inflicting upon his body "one mortal wound, of the breadth of one inch, and of the depth of three inches," of which he "instantly died." The term body, in such a connection, clearly means only that part of the human frame to which the head and limbs are attached. Of what consequence is it, whether the wound was given to the left side or to the right side, below the fifth rib or above the fifth rib, or whether there were two wounds or one, if both or either were mortal? That these minute particulars are not matters of substance, is evident, from the well established rule that, if averred one way in the indictment, they may be proved another way on the trial. To test the objection, let us suppose that the wound, instead of three inches in depth, had turned out to be two inches and three-quarters, would the legal consequence have been an acquittal? Even the musty records of antiquity furnish no authority for such a proposition. If they did, we should not feel ourselves compelled to follow it. The common law is a progressive science, and one of its leading attributes is adaptation to the circumstances and spirit of the age, and to the common sense of the people, of whose actions it is made the rule, and of whose will it is the presumed exponent. The statute, too, admonishes us to disregard the mere cobwebs of former days. "No indictment shall be

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deemed invalid, &c., by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant."

That the defendant did not consider himself prejudiced, or likely to be prejudiced, by the alleged uncertainty of this indictment, is shown by the fact, that instead of demurring, he went to trial upon it, and had no consciousness of the supposed error until after the verdict of guilty had been pronounced, and he was instructed by his counsel to move in arrest of judgment.

There are many objections which may be taken before, that cannot be taken after verdict. And the law on that point is the same in criminal as in civil cases.

The next suggestion relates to one of the jurors, who, being challenged, said that "he had read part of the statements in the papers at the time of the homicide, and had formed a preconceived idea in regard to the prisoner's guilt or innocence, but had no bias one way or the other; that his preconceived idea or impression would in no way influence his verdict, but would be governed entirely by the evidence produced on the stand."

The court below admitted the juror to be qualified, and it is quite obvious that if jurors are on such grounds to be rejected, it will be impossible at the present day to administer justice in cases sufficiently exciting to inspire a newspaper paragraph. Every male adult, over twenty-one and under sixty, "in possession of his natural faculties, and not infirm or decrepit, of sound judgment and well informed" (and no other can be a juror), must read the news of the day, and must, from such reading, form some "idea or impression." If an idea or impression, therefore, is to be a disqualification, no competent juror, at the present time, can be found; for no man, in a land of newspapers, can be "well informed" without reading; or, with a "sound judgment," can read without receiving an "idea or impression."

The case of *Cancemi*, when last under review in the Court of Appeals, involved two propositions, one relating to the

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alleged improper allowance of a juror, and the other to the erroneous charge. All the judges agreed that there was error in the charge, but all did not agree, nor was it necessary to the result that they should, that the juror was improperly admitted. In other words, all agreed in the propriety of a new trial, some on one ground, some on the other, and some on both. The decision, therefore, can hardly be considered as a controlling authority on either of the questions referred to—certainly not to support the proposition for which it is cited in the present case. In its strongest aspect, it went no further than to hold that a juror who had both “formed and expressed an opinion,” which was so fixed that it would require affirmative evidence to dislodge it, was not qualified to sit as an impartial umpire between the people and the prisoner. • The case of *Cancemi*, therefore, although it illustrates, does not dispose of that of *Sanchez*, and we think the principle contended for will be found so embarrassing in practice that it should rather be restricted than extended.

To understand the other points discussed by the prisoner's counsel, a brief statement of facts is necessary: *Sanchez*, it appears, only a few weeks previous to the homicide, had been married to *Curnon's* daughter, and had taken up his residence in the same house with his father-in-law. The family consisted of Mr. and Mrs. *Curnon*, their two daughters, and *Sanchez*. On the night in question, he had possessed himself, for what reason does not appear, of *Curnon's* sword-cane, or rather of the sword drawn from the cane, and, with his wife, was in the room of his father-in-law, the old people being below in the basement. Mrs. *Curnon* says:

My husband and I proceeded up stairs to go to bed, and found the door of the parlor, which was the room in which my husband and I slept, locked; I saw *Sanchez* standing by his bedside, as I looked in through the small window at the head of the stairs; I said, “Feely, open the door,” which I repeated three times, but he made no reply; I then spoke to *Sarah Jane*, who was sitting up in the bed, and said, “*Sarah Jane*, open the door,” to which she answered, “He won't let me;”

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I put my hand to the door and gave it one shove, and it flew open, which forced me into the room; my husband must have followed me; there was no one there but Sanchez, who bounded out of the bedroom as I came in the door; he rushed upon me, and stabbed me with a sword which he held in his hand; then Sarah Jane jumped out of the bed and passed him; he turned quick and gave her a stab in the shoulder; he then turned upon my husband; I saw my husband's hand raised; I saw Sanchez make a plunge at him with the sword-cane; I saw but one blow; in the morning I saw my husband lying dead on the floor, &c.

Here would seem to have been, in the common acceptation of the term, no "premeditated design to effect the death of the person killed," but still the act may be murder. Killing, says the statute, shall be deemed murder "when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.(a) Whoever recklessly uses a murderous weapon, is, in law, responsible for the consequences. The law does not regard the want of inadequate motive as a mitigation or justification, or as evidence of that species of insanity, which makes the perpetrator an irresponsible machine. Mere jealousy, like hatred or malice, may explain, but cannot excuse, the wanton disregard of human life. The object of penalties is to compel men to control their depraved minds, and to teach them not to yield to frenzied passion. In this view, what defence could it be to say that some person had told the prisoner—falsely, as appears—that his wife had been unfaithful? The rumor communicated to the injured husband might inflame passion, but, in the case of a "dangerous weapon," would have no tendency to show any absence of "design to effect death," so as to reduce the crime from murder to manslaughter. More especially was

(a) *Sed vide, Darry v. The People* (2 Park. Cr. R., 606), as to the inapplicability of that subdivision of the section to a case of homicide resulting from a direct assault of one person upon another.

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the inquiry irrelevant when the person killed, instead of being the alleged adulterer, was the father of the wife.

Is a husband, on being told of his wife's supposed infidelity, to seize a dagger, and on the instant commence stabbing every person that comes near him, and then to quote the monstrous atrocity of the act, in connection with such rumor, true or false, as evidence of insane frenzy? We think not—and that the question objected to by the public prosecutor, although it might as well have been allowed, was lawfully overruled, and that no injustice has been done by its exclusion.

The same remark applies to several other questions which were excluded by the court below.

A point has been raised as to the testimony of the prisoner's wife, who, by consent, was permitted to be sworn on his behalf, but who, when sworn, stated that her husband did not accuse her of any improper intercourse. This statement being sought to be contradicted by her answers before the coroner, the District Attorney objected to the question, on the ground that a party cannot impeach his own witness. Such, undoubtedly, is the rule of law. There was, therefore, no legal error in the exclusion. And as to any supposed injustice, it was sufficiently obviated by the subsequent admission of all the proceedings had before the coroner, and among them the following statement:

My husband accused me of having improper intercourse with a man named Annisetto Lajeunechette, and threatened that unless I told the truth he would stab me; he accused me of being a prostitute; I was sitting up in bed crying at the time; my mother knocked at the door on account of his remarks; I heard her burst in the door.

So that if the defendant's own witness had in fact contradicted herself, both the versions given by her were submitted to the jury, to be weighed as they might deem proper. Which of the two they believed does not appear; but neither, it is clear, warranted, or was deemed to warrant, a verdict of acquittal or of manslaughter.

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The result is :

First. That the indictment, in the particulars excepted to, was sufficient, or that its defects, if any, were merely formal and were cured by the statute of amendments and by the verdict.

Second. That the juror objected to, being impartial, within the meaning of the law requiring jurors to be persons "of sound judgment and well-informed," was properly allowed to be sworn.


Third. That whether information of his wife's alleged infidelity was communicated to the prisoner or not, and whether such information, if communicated, was true or not, was an immaterial inquiry, as it in no way tended to justify the homicide, or to ~~change~~ its grade from murder to manslaughter.

Fourth. That neither the evidence excluded, nor the evidence received, had any tendency to show legal insanity, or to exempt the perpetrator of the homicide from responsibility for his acts.


Fifth. That the heat of passion, where there is a design to effect death by a dangerous weapon, is no excuse in law, or palliation of the act, although not premeditated and not directed against any particular individual, if the act evinces a depraved mind and a reckless disregard of human life.

Sixth. That as, therefore, there was no legal error in the rulings of the court below, and tested by the statute "of crimes punishable with death," no injustice in the verdict of the jury, the application for a new trial must be denied, and the judgment affirmed.

Judgment affirmed.

SUPREME COURT. New York General Term, February, 1860. *Sutherland, Bonney and Leonard*, Justices. 

JOHN PFOMER, plaintiff in error, v. THE PEOPLE, defendants in error.

Where, on a trial for murder, the court, in charging the jury, submitted to them to decide whether the prisoner was guilty of murder or manslaughter, or whether the act in question was justifiable homicide, and after an absence of twenty-four hours, the jury, not having agreed, returned into court and asked for further instructions on the law, when the court further charged the jury that if they believed the witnesses, the case was clearly within one of the degrees of manslaughter, and it was for the jury to say which degree, such further charge was held to be erroneous, as withdrawing from the jury the decision of questions of fact. 

In such a case it is purely a question of fact for the jury to determine whether the prisoner, at the time he slew the deceased, had reasonable ground to believe his own life to be in danger from the deceased.

Where a case rests upon circumstances, it is for the jury to construe them and to say whether they necessarily impute guilt to the defendant, or whether they are consistent with his innocence.

On a trial for murder, where the death occurred in a personal encounter, and the defence is that the killing was justifiable, on the ground that the prisoner, at the time he slew the deceased, had reasonable ground to believe his own life to be in danger, whether it is competent for the prisoner to prove the violent and ruffianly character and habits of the deceased, and whether such character and habits must be brought to the knowledge of the prisoner, discussed by counsel, with a full collection of the American authorities on these questions.

THIS case came before the court on writ of error. By the return, it appeared that in April, one thousand eight hundred and fifty-nine, an indictment in the following form was found against the defendant in the New York General Sessions :

City and County of New York, ss :

The Jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath, present :

That John D. Pfomer, late of the first ward of the city of New York, in the county of New York, aforesaid, on the

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twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-nine, at the ward, city and county aforesaid, with force and arms, in and upon one Charles Sturgis, in the peace of the people of the State, then and there being, willfully and feloniously did make an assault.

And that the said John D. Pfomer, a certain pistol then and there loaded with gunpowder and one leaden bullet, which he, the said John D. Pfomer, in his right hand then and there had and held, then and there willfully and feloniously, did shoot off and discharge, at and against him, the said Charles Sturgis, and at and against the right side of the chest of him, the said Charles Sturgis, giving unto the said Charles Sturgis, then and there with the leaden bullet aforesaid, so shot off and discharged as aforesaid, out of the pistol aforesaid, so loaded as aforesaid, in and upon the right side of the chest of him, the said Charles Sturgis, one mortal wound, of the breadth of one inch and of the depth of five inches, of which said mortal wound he, the said Charles Sturgis, at the ward, city and county aforesaid, from the said twenty-fifth day of March, in the year aforesaid, until the twenty-seventh day of March, in the same year aforesaid, did languish, and languishing did live, and on which twenty-seventh day of March, in the year aforesaid, the said Charles Sturgis, at the ward, city and county aforesaid, of the said mortal wound did die.

And so the jurors aforesaid, upon their oath aforesaid, do say that he, the said John D. Pfomer, the said Charles Sturgis, in the manner and form, and by the means aforesaid, at the ward, city and county aforesaid, on the day and the year aforesaid, willfully and feloniously did kill and slay, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

NELSON J. WATEBURY,

District Attorney.

On the 19th day of April, 1859, the defendant was arraigned on said indictment, in said Court of General Sessions, and

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pleaded not guilty. This indictment was subsequently removed into the Court of Oyer and Terminer in and for the city of New York. The issue so joined came on to be tried on the 26th day of April, 1859, before Mr. Justice Davies, of the Supreme Court, and a jury duly impaneled to try said issue.

The prosecution called as a witness,

Frederick Schwitzgebele, who, after being duly sworn, testified as follows: I live at No. 78 Forsyth street; I know Pfomer, the prisoner, and Charles Sturgis, the deceased; the prisoner, is a baker; he was my partner; we did business at No. 36 Bowery, in the basement; kept coffee, cakes and oysters; we kept open from five o'clock in the afternoon till five o'clock in the morning; I was there Thursday night and Friday morning, the 24th and 25th of March last; the prisoner was there; I got there in the afternoon of Thursday, and staid till this happened; I saw Sturgis (the deceased) there; he came there about half-past twelve Friday morning; several young men there when he came in; there were three or four customers there; the servant girl, Fanny M. Carter, and a boy named Vincent were there; he came out of the kitchen; it is necessary to pass through the saloon to get into the kitchen; when Sturgis and his friend, Kerrigan, first came down into the saloon, they were skylarking—that is, fooling and pushing one another; at the same time I was attending to the customers; a customer came to the bar and paid nine cents for what he had; I was busy, and Sturgis leaned over the bar and opened the till; the man had a ten cent piece; Sturgis took out a penny and gave it to him; I don't know what became of the ten cent piece; Sturgis asked one of the three or four customers to treat; one of them said "Yes;" he asked his friend Kerrigan if he would drink, and he said "Yes, he would have a glass of porter;" Sturgis drank once; he then turned round and picked up a sugar bowl, and tossed it up, and spilled all the sugar out of it, and I told him to hold on, and put it down, and he did so; after that Sturgis went toward the kitchen; the kitchen door was bolted; he looked over the partition, and told

the girl who was in the kitchen to open the door; the girl was in the kitchen; the girl would not open it at first; Sturgis kept pulling at the door, and said he would break it if she did not open it; she then opened the door, and Sturgis went into the kitchen; he was there five or ten minutes; the defendant afterwards came out of the kitchen, and Sturgis after him; I then called Sturgis up to drink the rest of his beer; he had not finished it; it was standing on the bar; he took off his hat and coat, and went into the kitchen again, in his shirt sleeves; he was in the kitchen about five minutes; I heard him speaking loud to the defendant; both were speaking loud; I heard defendant tell him to go away from there; I told Kerrigan to go in and get his friend out; when Kerrigan went to the kitchen door, the pistol went off; Sturgis came out of the kitchen, and said, "I am shot;" that is all I heard; Sturgis was taken away; he was wounded in the breast.

Cross-examination: The prisoner's business was to bake the cakes and prepare coffee in that kitchen; he was there every night; the servant woman was there to aid him; customers were not allowed in the kitchen, though they went in sometimes: the saloon is the only public part of the premises; there is a store-room back of the kitchen; the defendant was in the kitchen at work baking cakes for the customers that night, when Sturgis came there.

Re-direct examination: Sturgis was in liquor that night; he generally came in every evening; he generally conducted himself quietly, and did no harm when he came in early in the evening; I never saw the deceased do anything out of the way in my life; I have known him a long while; he was in the habit of coming in our saloon almost every night for supper; I have been in that saloon several years, and was almost always in whenever the deceased and his friends came for supper; I never saw him commit any act of violence, or do anything wrong.

Fanny McCarty was then called on behalf of the prosecution, and, after being duly sworn, testified as follows: I live at No. 36 Bowery; I know the defendant and Sturgis (the de-

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ceased); I saw him in the saloon every night; I was in the employ of the defendant and his partner; Sturgis had his supper there that night; I was there at the time Sturgis was shot, and received some of the powder in my face; I was in the kitchen; Sturgis came there early in the night, and had his supper with a man with one eye; they both went out; they were very fond of swearing; they came back between twelve and one o'clock; Sturgis put his hand over the top of the partition, and said if the door was not opened he would throw it in; the door was fastened on the inside; I stood by the door, and said I would open the door, and did open it; he said he wanted to get in to lick the baker (the defendant); the defendant was standing at the table inside making cakes; he fisting the defendant in a silly way, the defendant told him to go away, that he wanted nothing to do with him; the defendant said, waving both hands, "Go away, go away,"—to go out of the kitchen into the saloon; he did so, and shut the door of the kitchen; Sturgis remained out three or four minutes, and came right back again, and said, "I want to lick no man but the baker" (defendant), and took hold of defendant; defendant pulled away from him, and told him to let him go, to go right back into the saloon; defendant went back into the store-room, a recess, and took a pistol; defendant told him to go away, that he wanted nothing to do with him; Sturgis did not go; the defendant took the pistol and said, "Now, will you stand back?" he cocked the pistol at him and fired; Sturgis did not stand back; Sturgis had nothing in his hand; Sturgis, when he asked to open the door, cursed out; after defendant put Sturgis out of the kitchen, he shut the door; it was not fastened; Sturgis stood still, just as if he was not afraid of anything; Sturgis followed the prisoner into the recess; defendant walked pretty quick to get the pistol; defendant told him in an angry manner to stand back; Sturgis rubbed his breast, and said he was shot or killed, and staggered round, and went out into the saloon, where he threw up blood; I don't remember seeing Sturgis in the kitchen before; I have seen two or three young fellows come into the kitchen twice or

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three times; Frederick Vincent was in the kitchen at the time; I saw the body of Sturgis at the City Hospital on Monday or Tuesday after that; he was dead then.

Cross-examination: Sturgis hit defendant just as if he wanted to get him in a passion; Sturgis followed the defendant into the store-room when defendant went in to get the pistol; no door to the store-room, except the entrance from the kitchen; defendant said in the store-room to Sturgis, "Now, will you stand back?" he did not stand back, and he fired at him; Sturgis was not in the store-room at all; he stood at the door when he was shot.

Timothy Donovan, called for the prosecution, and after being duly sworn, testified as follows: I never saw defendant before to-day; I know the saloon 36 Bowery; I and Seagrist were in there that night, fifteen or eighteen minutes, and left after twelve o'clock; defendant waited on me at the table; Sturgis came in with Kerrigan; Sturgis and Kerrigan were skylarking; then a boy about seventeen years old treated Sturgis; Sturgis skylarked with the person who treated him, and with the prisoner; Sturgis got into the kitchen very easy; he did not at the first, but did the second time, put his hand on the partition; the prisoner looked very mad—angry; Sturgis came out himself; I think defendant did not come out with him; Sturgis came out and carried on again, full of fun; Sturgis laughingly said he could lick any man in the house but the baker; did not hear him curse or swear at all; he, Sturgis, went in there, and heard a pistol; all still in there; door not shut, and could hear.

Cross-examination: I did not know either party; I was about thirty feet from the kitchen door; I was examined before the coroner's inquest, and I testified as I now do; I am certain Sturgis went into the kitchen twice; Sturgis was in fifteen or twenty minutes before he went into the kitchen; I did not testify on the inquest that Sturgis came in, and went right through into the kitchen.

Officer *William J. Williams* was then called on behalf of the prosecution, and after being duly sworn, testified: Heard of

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this two or three minutes after it happened; went into saloon; I saw the deceased in the saloon; he was on his hands and knees; I asked him what was the matter, and he said he was shot; officer Holmes and I put him in a coach, and took him to the New York Hospital, and left him there.

Dr. Joseph J. Hall, called by prosecution, and after being duly sworn, testified as follows: I am physician at New York Hospital; I was at the hospital the night deceased was brought there; his name was Sturgis; this was the only one brought; he had two wounds on the right side of his chest, made by two balls; I afterwards pointed this body out to Dr. Quimby, it was Saturday afternoon.

Dr. George A. Quimby was then called on behalf of the prosecution, and after being duly sworn, testified as follows: Is a physician at New York Hospital; I received this body from the last witness; the two wounds caused his death; he died on the Sunday afternoon after he came in.

Frederick Vincent was then called for the prosecution, and, after being duly sworn, testified as follows: I know the defendant and the deceased; were at the saloon that night; the deceased got there about twelve o'clock that night; there were three or four customers there; the girl and the defendant were in the kitchen; I went in there; I was there when the deceased came in; Sturgis talked to the customers, took off his coat, and washed himself; Sturgis went to the door and knocked on it, and the girl opened it for him; he went in, and began to fool with the baker; he only said, "Open the door;" he did not curse or swear; he had hold of defendant by the wrist, and both went into the saloon; Sturgis went and drank his beer, and the defendant went back to the kitchen; when he had half drunk his beer, he said, "Let us have some more fun with the baker;" Sturgis then went into the kitchen; defendant fired at Sturgis; one cap missed, and the second time shot him; shot him when deceased was three or four steps in the kitchen; the prisoner stood in the door of the store-room when he shot; I did not hear deceased and defendant say anything; I ran out.

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Cross-examination: I have known Sturgis eight or nine years; I am very friendly with him.

The prosecution here rested the case.

The defendant's counsel thereupon called *John Ploth*, as a witness on behalf of the defence, who, after being duly sworn, testified as follows: I keep a saloon at 87½ Bowery; I know Sturgis, the deceased; I have known him for a long time; I have also known the prisoner for a considerable time.

The court here asked the counsel for the prisoner what he intended to prove by this witness.

Defendant's counsel thereupon offered to prove by this witness (at the same time stating to the court that he intended to call numerous other witnesses to the same facts), that the deceased was addicted to rowdy and ruffianly habits; that he was in the constant practice of perpetrating gross and unprovoked acts of violence upon the persons and property of peaceful and unoffending citizens; that, without any cause or provocation, he was in the habit of using knives and pistols upon persons with whom he came in contact, thereby subjecting to imminent danger the lives of such persons; that it was the constant practice of the deceased to carry deadly weapons concealed about his person. The court refused to allow the above-mentioned facts, or any of them, to be given in evidence, unless it was coupled with the offer to show that the same was or were known to the prisoner; to which decision the counsel for the prisoner then and there duly excepted.

The counsel for the prisoner thereupon proposed to prove by this witness that the deceased was in the habit of committing violent assaults with knives and pistols upon the proprietors of restaurants, like that kept by the prisoner; and that deceased was in the habit of maliciously and wantonly destroying the property in such restaurants, and beating the inmates in such restaurants. The court refused to allow the evidence, or any part thereof to be given; to which refusal the counsel for the prisoner then and there duly excepted.

The counsel for the defendant thereupon proposed to prove by this witness, that the deceased, on the night of the homicide

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in question, had maliciously destroyed the property in the restaurant kept by the witness, at No. 37½ Bowery, in said city, and that the deceased had committed gross and unprovoked acts of violence upon persons whom he met in said restaurant. The court refused to allow this evidence to be given; to which decision the counsel for the prisoner then and there duly excepted.

It was conceded by the prosecution that the defendant was a person of good character, for integrity, peace and quietness. The cause was summed up to the jury by the counsel for the prisoner and prosecution, respectively.

The court then proceeded to charge the jury, and, among other things, charged: "That if the jury believed the testimony of the witnesses, the prisoner was guilty of the crime of murder or manslaughter, if the act of taking the deceased's life was not justifiable or excusable homicide." (The judge then explained the provisions of the statute in reference to justifiable and excusable homicide, and the crimes of murder and manslaughter.) "That if they (the jury) believed the prisoner was in great danger of loss of life, or of serious personal injury, at the hands of the deceased, and killed him, in that defence of life or person he was justified, otherwise not." To this portion of the charge the counsel for the prisoner then and there duly excepted.

The court thereupon charged the jury, that to justify the taking of life, the danger to the person taking it must be real and imminent. To this portion of the charge the counsel for the prisoner then and there duly excepted.

The jury retired to consider upon the verdict, and after an absence of over twenty-four hours, returned into court and stated that they desired further instructions from the court, but did not specify in what particular. The court instructed the jury, that if they believed the witnesses, the case was clearly within one of the degrees of manslaughter, and it was for the jury to say which degree. To this instruction of the court, the counsel for the prisoner then and there duly excepted. The jury thereupon retired, and after an absence of some ten

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in malice, or from a principle of self preservation, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated. (3 Stew. & Port., 308.) And in this view, we think the evidence was improperly ruled out. Reasonable fear, under our code, repels the conclusion of malice; and has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted? Does it make no difference whether one's adversary be a reckless and overbearing bully, having a heart lost to all social ties and order, and fatally bent on mischief, or is a man of Quaker-like mien and deportment? One who never strikes, except in self-defence, and then evincing the utmost reluctance to shed blood? We apprehend that the imminence of the danger, as well as the chances of escape, will depend greatly upon the temper and disposition of one's foe. In these cases, every individual must act upon his own judgment, and in view of his solemn responsibility to the law. * * * Who, knowing the character of Kyd, the pirate, or of the infamous John A. Murrill, would not instantly upon their approach, armed with deadly weapons, act upon the presumption that robbery or murder, or both, were contemplated?"

A new trial was granted on this, among other grounds.

In the case of *Keener v. State* (18 Geo. R., 194), it appeared that the homicide was perpetrated in a house of ill-fame. Ill-feeling previously existed between defendant and deceased, as both were rivals for the favors of the landlady. There was evidence going to show that the *deceased assaulted the prisoner*, although it did not appear that the assault was accompanied by a battery. On the trial, testimony was offered to show the violent character of deceased in the place where the homicide occurred. This was ruled out, and exception taken. The Supreme Court held this ruling erroneous. On a motion for a new trial, per Lumpkin, J., in discussing this point, the court say:

"Upon examination, I am satisfied that the questions propounded to Prater were in the proper form. Mr. Greenleaf, in

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Stew. & Port., 808; *Munroe v. State*, 5 *Geo.*, 137.) "The judgment will be reversed, and the cause remanded." (*Pp.* 590, 591.)

In *Payne v. Com.* (1 *Met. Ky. R.*, 370), decided in 1858, it was held that the character of deceased for violence, and habitually carrying concealed deadly weapons, was competent evidence for the defendant.

The court, per Duval, J., in reference to this point, say (*p.* 379): "We are of opinion that the testimony in question was admissible, in view of all the other proof as presented by this record. The general principle upon which the admissibility of such evidence depends, was recognized in this court, by the cases of *Rapp. v. Com.* (14 *B. Mon.*, 614), of *Meredith v. Com.* (18 *B. Mon.*, 49), and *Cornelius v. Com.* (15 *B. Mon.*, 546), although the point was not in either of these cases directly presented."

In *State v. Field* (14 *Maine R.*, 244), the prisoner was indicted for the murder of his brother. The deceased went into a room occupied by the prisoner, which each had an equal right to occupy. The prisoner, immediately upon the deceased entering the room, struck him with an axe, and killed him. Deceased did not assault, or attempt to assault the prisoner. Deceased did no act which he had not a legal right to do. On that trial, the counsel for the prisoner offered to prove that deceased was in the habit of drinking to excess whenever he could get rum, and that drinking spirits of any kind had the effect of making him quarrelsome, dangerous and savage. The court below ruled out this evidence. The Supreme Court sustained this decision.

In *Com. v. York* (9 *Met.*, 93), the point as to the admissibility of evidence, touching the violent character of the deceased, did not arise.

State v. Thawley (4 *Harring., K.*, 562), was a case at *nisi prius*. The circumstances of the homicide do not appear in the report. It does not appear whether defendant was assaulted by deceased, or what justification or palliation, if any, the prisoner had for taking the life of the deceased. Yet,

according to the report, the prisoner was acquitted. This cannot be regarded as an authority against the admission of evidence of the violent character of deceased, where he assaulted the prisoner. In this case, Harrington, one of the judges, intimates, that he has known of the introduction of evidence of this kind in four cases, and that such evidence comes within the reason of the principle, that, "in particular cases where the character of the prosecutor is mingled with the transaction in question, it forms a point material to the issue and may consequently be inquired into." (*Ros. Ev.*, 88.)

In *Wright v. State* (9 *Yerg. R.*, 342), the prisoner was indicted for maliciously stabbing Underwood, a free man of color. Upon the trial, the defendant's counsel offered to prove that Underwood, the prosecutor, was a turbulent, violent, saucy fellow. There was no pretence that he had assaulted the prisoner nor was proof offered that he had assaulted others. The Supreme Court, per Turley, J., upon this point, say: "The second cause assigned as error, is that the court refused to hear proof, to show that the prosecutor, Underwood, who was a free man of color, was a turbulent, insolent, saucy fellow. We think there was no error in this; for, supposing him to have been of the character described, we cannot see how this would have extenuated the offence of stabbing him, and most certainly the prisoner does not stand in such a relation toward him as to justify his being very particular in demanding respectful treatment from him."

Here it will be perceived that the offer was not to prove that deceased was a man of violent habits, and accustomed to commit assaults upon peaceful and unoffending persons, but that he was a "turbulent, violent and saucy fellow." The offer of proof related merely to *words* used, and not to *acts* done by the prosecutor.

In *State v. Tilly* (3 *Iredell*, 424) the prisoner was indicted for the murder of one William G. Martin. There was no evidence on the trial showing or tending to show that the prisoner had been assaulted by the deceased. The prisoner's counsel proposed to inquire of one of the witnesses "whether the deceased

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did not bear the character of being high-tempered, overbearing and oppressive towards his overseers and tenants, but the question was objected to, and ruled out." There was no offer to prove that deceased was in the habit of assaulting or committing violence of any kind, either upon his overseers or others.

In *State v. Barfield* (8 Iredell, 344), the prisoner was convicted of the murder of Alfred Flowers. The prisoner was not assaulted by the deceased, nor was deceased guilty of any acts of violence whatever.

The counsel for the prisoner then offered to prove by a witness who had formerly lived with the deceased, that his general character was that of a violent, overbearing and quarrelsome man, and that such were his domestic habits. On objection made on the part of the State, the court rejected the evidence. This ruling was sustained. The court, per Ruffin, Ch. J. (p. 50), say: "It is too much to stake the life of one man upon the fears of another of danger from him, merely upon his character for turbulence, and when he is making no assault. Such would be the case here, if the evidence had been received; for the prisoner's own witnesses proved that there was no assault on him."

In *State v. Jackson* (17 Miss., 544), the prisoner was indicted "for feloniously assaulting and shooting one Jonathan Millsap, with intent to kill him." The testimony showed that the deceased did not assault or attempt to assault the prisoner. The prisoner, at a distance of thirty yards from the deceased, shot him—the latter being unarmed. The court excluded the evidence. The Supreme Court sustained this ruling. In their opinion, delivered by Ryland, J., they say: "As to the character of the man shot (that is, Millsap), for danger and desperation, it was properly excluded from the jury. There may be cases where the general character would be proper evidence before the jury; it would explain the situation of the parties, and their acts and deeds at the time." (P. 548.)

In *Oliver v. State* (17 Ala., 587), the prisoner was indicted for the murder of one William E. Hammond. The point as

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to the character of deceased, did not in any way arise in the case. The court held that "whether the circumstances are, such as to create a reasonable belief in the mind of the slayer that a necessity exists for taking the life of another, is a question for the jury, in the solution of which they may consider the condition of both parties." (P. 588.)

Wharton, in his *Am. Cr. Law* (§ 641, 4th ed.), observes: "On the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood generally by the accused and others, to be a quarrelsome, riotous and savage man, is inadmissible. In the eye of the law, to murder the vilest and most abject of the human race, is as great a crime as to murder its greatest benefactor. In one or two cases, however, while the law, as above laid down, was distinctly recognized, it has been said that when the killing has been under such circumstances as to create a doubt as to the character of the offence committed, the general character of the deceased may sometimes be drawn in evidence. But the rule undoubtedly is, that the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*, for it would be a barbarous thing to allow A. to give as a reason for killing B., that B.'s disposition was savage and riotous."

The same author, in his work on Homicide (p. 249), says: "It has already been briefly considered how far the character of the deceased for peace and order may be drawn into question, when the defence taken is, that the defendant, from all the circumstances in the case, of which the deceased's character was one, had reason to be in fear of his life. As was then shown, there have been cases in which courts have been obliged to allow such evidence to be introduced, and it is easy to imagine cases in the future in which it would be impossible to exclude it. But, as a general principle, the rule continues unbroken that evidence that the deceased was riotous, quarrelsome and savage, is inadmissible, even though such knowledge be brought home to the defendant himself. Any other rule

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would allow a private citizen to take upon himself the province of government in the punishment of crime."

The only authorities cited by this author in his *American Criminal Law*, and his *Law of Homicide*, are: *Queensbury v. State*, 3 *Stew. & Port.*, 315; *State v. Tackett*, 1 *Hawk.*, 210; *Wright v. State*, 9 *Yerg.*, 342; *State v. Jackson*, 17 *Miss.*, 544; *State v. Tilly*, 3 *Ired.*, 424; *State v. Field*, 14 *Maine R.*, 248; *Com. v. York*, 9 *Met.*, 110; *State v. Hawley*, 4 *Harring.*, 562; *Com. v. Hilliard*, 2 *Gray*, 294; *Oliver v. State*, 17 *Ala.*, 587; *Com. v. Seibert*, *Whar. Hom.*, 227, 228.

Wharton does not state the grounds on which the testimony is admitted or excluded. With an impartiality as felicitous as it is rare among elementary writers, in emphatic and unambiguous terms he states the law *both ways*, and escapes from the inconsistency resulting from his liberal and *comprehensive* views, only by asserting that the testimony is sometimes admitted and sometimes rejected. I have shown the principle running through all the adjudications, and I have harmonized all the cases entitled to any weight. I have shown that *all of the above cases* referred to by Wharton (with the exception of *Com. v. Hilliard*, 2 *Gray*, 294), contain the doctrine for which I contend, to wit, that whenever *the deceased assaulted the prisoner*, evidence of the violent character of the deceased was admissible. I have also shown that the same doctrine is recognized and adjudicated in the following cases, to which Wharton does not refer upon this point: *Monroe v. State*, 5 *Geo.*, 85; *Keener v. State*, 18 *Geo.*, 194; *Pritchett v. State*, 22 *Ala.*, 39; *Franklin v. State*, 29 *Ala.*, 14; *Dukes v. State*, 11 *Ind.*, 557; *State v. Hicks*, 27 *Mo.*, 555; *Payne v. Com.*, 1 *Met. Ky. R.*, 370; *State v. Barfield*, 8 *Ired.*, 344.

Commonwealth v. Hilliard (2 *Grey*, 294), was a *nisi prius* case. The report says: "There was evidence tending to prove an assault by the deceased upon the defendant immediately before the striking of the fatal blow." The court refused to allow evidence of the violent character of the deceased. It does not appear that any *writ of error* in the case was ever applied for, or that the case was carried further. The prisoner

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was convicted of manslaughter only. The court, in the short opinion delivered upon the refusal to admit the evidence in question, cited no authority, nor did the Attorney-General, in opposing its introduction, cite any, except *Commonwealth v. York*, in which the point was not raised, discussed, or even alluded to.

This single *nisi prius* case is the only one containing a doctrine adverse to that for which I have contended. It is submitted that it is not in the power of a Massachusetts court, by a single decision at *nisi prius*, to overthrow an unbroken series of adjudications in all the States of this Union. As an illustration of the fact, that the Supreme Court of Massachusetts is liable to err, it may not be considered *mal-apropos* to refer to the case of Dr. Webster. On the trial of *Cancemi* at the New York Oyer and Terminer, the learned judge who presided, in his charge to the jury, read with approval an extract from the charge of Chief Justice Shaw, in the case of Webster, in relation to the weight to be given to the good character of the prisoner. For this error a new trial was granted. The Court of Appeals held that the doctrine laid down by the Supreme Court of Massachusetts, in that case (5 *Cush.*, 814), was not law, and that character was of far more importance than that court was disposed to concede.

In the case at bar, "it was conceded by the prosecution that the defendant was a person of good character for integrity, peace and quietness." In such a case, it was especially proper, that he should be allowed to prove the ruffianly character of deceased. With the solitary exception of *Com. v. Hillyard*, not a single case sustaining the ruling of the judge below can be found, while the authorities are uniform and abundant, showing his error.

In a word, all the authorities show that if the prisoner be assaulted by the deceased, evidence of the violent character of the latter is admissible. In the case at bar, Pfomer, the prisoner, was assaulted by Sturgis, the deceased. It appears from the case, that deceased said he wanted "to lick no man but the baker" (prisoner), that he "took hold" of prisoner,

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and that he (deceased), "hit defendant just as if he wanted to get him in a passion." •

The testimony was therefore clearly admissible, and the exclusion of it by the court below was error, for which a new trial should be granted.

2d. In order to render the testimony as to the violent character of deceased admissible, it was not necessary to prove that it was known to the prisoner.

Even where the deceased has made threats, with reference to the prisoner, they are admissible in evidence, *although not communicated to him*.

In *Stewart v. State* (19 O. R., 302), defendant was indicted for murder, and convicted. The Supreme Court held that it was competent for the defendant to prove that the person alleged to have been murdered, and others, had agreed to go to the house where defendant boarded, for the purpose of quarreling with him, and that they had approached him with that intent at the time the affray commenced, which resulted in the homicide; and to prove the conversation of the parties in relation to such agreement, though the defendant had not been informed of the intent of the parties in approaching him.

A new trial was granted on account of the exclusion of this testimony. The Supreme Court, per Caldwell, J., in discussing this point, say: "If such had been the object of these persons in this visit that night, it ought to be proved, although no information of the kind had been, in language, conveyed to the defendant. He might be able, when they met, from their manner and conduct to discover their intention, although they had made no verbal expression." (P. 306.)

In *Keener v. State* (18 Geo. R., 194), it was held that previous threats, if offered for the purpose of showing the state of mind or feeling of the deceased, were inadmissible, although not communicated to the prisoner.

In *Campbell v. People* (16 Ill. R., 18), this point arose. The Supreme Court, per Caton, J., say: "Upon the trial the defence offered to prove that on that day, and at other times shortly before his death, the deceased had made threats against

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the prisoner. This evidence the court ruled out, and an exception was taken. In this the court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct towards the prisoner at the time of their meeting, and of the affray." A new trial was granted.

In the case of *Cornelius v. Com.* (15 B. Mon. R., 539), the prisoner was charged with murder. On his trial he proved threats on the part of the person killed, to kill him, which threats had been communicated to him. He then offered to prove other threats, *not communicated*, which the court refused to admit. It was held to be error to exclude such proof.

In *Dukes v. State* (11 Ind., 557), before cited, on the trial the prosecution were allowed to prove the character of deceased, on objection by prisoner's counsel, although it was not proven or sought to be shown that the prisoner had any knowledge on the subject. Exception was taken. The Supreme Court of Indiana sustained this ruling, although they say: "Where, as in this case, these facts may not have been known, we do not see how the evidence could be entitled to much weight." Whether entitled to much weight or not, the court held the testimony to be admissible.

If threats are admissible in evidence, although not communicated, on the ground that such proof tends to show the *mental status* of the deceased, at the time of the homicide, *a fortiori*, the character of the deceased for violence is admissible. The character of deceased for ruffianly violence, which he has built up for a series of years, would shed much more light on his *mental status*, and tend far more forcibly to illustrate his acts, than threats made some time previously, which might have been abandoned.

In some of the cases cited on Point I, it appears that the prisoner knew, and in others that he did not know, of the violent character of the deceased. The admissibility of the evi-

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dence has not been made to turn upon proof that prisoner possessed such knowledge, but the testimony has been admitted or rejected, according to the fact, whether deceased *assaulted* prisoner, or made some demonstration, which, in connection with his violent character, might give, or tend to give, the prisoner reasonable ground to believe he was in danger of loss of life or great bodily harm.

3d. In any point of view it was the right of the prisoner on the trial to introduce evidence of the violent character of the deceased.

This issue was opened by the prosecution, as will appear by the following extract from the re-direct examination of Frederick Schwitzgebele, a witness for the prosecution: *Re-direct examination*: Sturgis was in liquor that night; he generally came in every evening; *he generally conducted himself quietly*, and did no harm when he came in early in the evening; I never saw *the deceased do anything out of the way in my life*; I have known him a long while; he was in the habit of coming in our saloon almost every night for supper; I have been in that saloon several years, and was always in whenever the deceased and his friends came for supper; *I never saw him commit any act of violence, or do anything wrong.*"

In *Dilks v. State* (11 Ind., 557), cited on the first subdivision of this Point, the Supreme Court held that the prosecution had a right to go into evidence of this kind in the *first instance*. At all events, it is clear that, after the prosecution had introduced evidence on this point, it was competent for the prisoner to controvert that testimony.

It is true, it does not appear from the bill of exceptions that the prisoner's counsel objected to the evidence. It is equally true that the District Attorney did not object to the evidence on this point sought to be introduced by the prisoner. The learned judge, upon the trial, permitted the prosecution to give evidence upon the point in question, but of his own motion prohibited the defendant from introducing any testimony upon the subject.

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4th. If it were necessary (which it is not), to show that prisoner knew of the violent character of the deceased, one of the best means of proving such knowledge, would be to prove the *existence* of the character in question.

How else could such knowledge be shown, ordinarily, except from its notoriety in the town, city or locality where the prisoner lived?

At all events, it should be left to the jury to infer the prisoner's knowledge of such character from its notoriety.

II. The court below clearly erred in refusing to allow the prisoner to prove that "deceased was in the habit of committing violent assaults with knives and pistols upon the proprietors of restaurants, like that kept by the prisoner; and that deceased was in the habit of maliciously and wantonly destroying the property in such restaurants, and beating the inmates in such restaurants. The court refused to allow the evidence, or any part thereof, to be given; to which refusal the counsel for the defendant then and there duly excepted."

In *Monroe v. State* (5 Geo., 85), cited on Point I, it was held, (as has already been shown) that the prisoner had a right to prove the character for violence possessed by the deceased, in brothels, as contradistinguished from his peaceful character elsewhere. Clearly, within the reasoning of this case, the violent character of deceased in restaurants was admissible. Besides, the prosecution had opened the door to this evidence, in proving by the witness, Schwitzgebele, that the deceased possessed a peaceful character in restaurants, or, rather, in the restaurant where the homicide occurred.

It will be observed that the testimony was ruled out, not on the ground that it was not offered to be proved that prisoner knew the character of deceased in this particular. The evidence was excluded unconditionally and unqualifiedly.

III. The court below erred in charging the jury "that if they (the jury) believed the prisoner was in great danger of loss of life or serious personal injury at the hands of the deceased, and killed him in that defence of life or person, he

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was justified, *otherwise not*. To this portion of the charge the counsel for the prisoner then and there duly excepted."

The court reiterated the same idea in another part of the charge, as will appear by the following extract from the bill of exceptions:

"The court thereupon charged the jury, that to justify the taking of life, the danger of the person taking it must be real and imminent. To this portion of the charge the counsel for the prisoner then and there duly excepted."

In the case of *Shorter v. The People* (2 Comst., 193), it was held that the charge of the court to the jury, "that, to render the killing justifiable, the jury should be satisfied that there was, in fact, imminent danger that the deceased would commit some great personal injury upon the prisoner," was erroneous.

The charge in this case was the same as in the case of *Pfomer*. The Court of Appeals distinctly held that one who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is also reasonable ground for believing the danger imminent that such design will be accomplished, although it may afterwards turn out that the appearances were false, and there was, in fact, no such design, nor any danger that it would be accomplished.

This doctrine was re-affirmed by the Court of Appeals, in the case of *The People v. Sullivan* (3 Seld., 396). The court, per Johnson, J., say: "It was contended on the argument that this charge required the jury to find whether imminent danger *actually* existed, and not merely whether Sullivan had reasonable ground to believe that it existed. If this construction of the charge was correct, the case of *Shorter v. The People* (2 Comst., 197), would show it to be erroneous, but we do not so understand the charge."

It will be seen that the charge of the court below in this particular, was in direct violation of these two decisions of the Court of Appeals.

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IV. The court below erred in instructing the jury, "that if they believed the witnesses, the case was clearly within one of the degrees of manslaughter, and it was for the jury to say which degree." To this portion of the charge the counsel for the prisoner duly excepted.

The court had already submitted the case to the jury, as to whether the prisoner was in imminent danger. The language of the court, in its charge, was :

"That if they (the jury) believed the prisoner was in great danger of loss of life, or of serious personal injury, at the hands of the deceased, and killed him in that defence of life or person, he was justified, otherwise not."

If it were right to submit this question of fact to the jury, it was error to withdraw its consideration from them. The effect of this appears from the fact that, although the jury had been out over twenty-four hours, yet, after this charge was given, "they thereupon retired, and after an absence of some ten minutes, returned into the court with a verdict of guilty."

The authorities cited under Point I, show that whenever the prisoner is assaulted by the deceased, it is a question *for the jury* to determine whether the prisoner had reasonable ground to believe himself in danger of loss of life, or great bodily harm.

It is plain that the court erred in this particular. In proof of this, although many cases might be cited, the following will suffice :

In the case of *Holmes v. State* (23 Ala., 17), it was held that a charge which has the effect of withdrawing from the consideration of the jury any evidence which tends to establish the plaintiff's case or the defence, is erroneous. However correctly the judge may lay down the law in his general charge, yet, if in a subsequent specific charge, he places the case upon the existence of certain facts, on which alone it may not properly be made to turn, the effect of which, if literally followed by the jury, is to withdraw from the consideration of other facts which tend neither to disprove or materially qualify those on which the charge is predicated, injury must be presumed from

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the error. The court, per Clinton, Ch. J., say: "In *Prichett v. Monroe* (22 Ala., 501), we held that a charge based upon a hypothetical state of facts, which excludes from the consideration of the jury other evidence which is before them, is erroneous, as tending to mislead the jury by creating the impression that they should be authorized to reject the other evidence."

* * "Such, we think, is the effect of the charge." (*Ib.*, 25.)

In the case of *State v. Harrison* (5 Jones N. C., 115), it appeared that at the trial the judge charged the jury that "if the prisoner went to a house, carrying a deadly weapon, with the purpose of provoking a fight if he found a certain person there, and did so, he was guilty of murder, although the deceased made the first assault." This was held to be error, on the ground that it was for the jury to say whether this state of facts alone, if true, or in connection with other circumstances, proved the defendant guilty of murder.

In conclusion, I will cite a case recently decided by this court, which is precisely in point:

One James Breen was indicted in the New York General Sessions, for larceny. He was convicted of that offence. On the trial, it appeared that Thorpe (who employed Breen as a bar-keeper), with a view to detect him—his suspicion having been previously excited—marked certain bank bills, and put them in the money till. The next night, after Breen had retired to bed (according to the testimony of Spencer, another witness), these bills were found in his possession. It was the duty of Breen to hand over to his employer, every night when the bar closed, all the money. The court below charged the jury "that the first two witnesses, Thorpe and Spencer, testified to a state of facts, which, if *true*, established a larceny of the prisoner, and rendered it incumbent on the jury to convict him." To this the prisoner's counsel excepted. This court sustained the exception, and granted a new trial. It was very properly held, that whether the circumstances, if *true*, established guilt, or whether they were as consistent with innocence as with guilt, was purely a question of fact for the jury.

In view of the rule of law cited in that case, and to which I invoke the attention of the court in this, no other decision could well have been made.

"It is therefore a rule of criminal law, that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderance, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt." * * * * "It is elsewhere said, that the persuasion of guilt ought to amount to a moral certainty," or, "such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt." "And this degree of conviction ought to be produced, when the facts proved coincide with and are legally sufficient to establish the truth of the hypothesis assumed—namely, the guilt of the party accused—and are inconsistent with any other hypothesis. For it is not enough that the evidence goes to show his guilt; it must be inconsistent with the reasonable supposition of his innocence." (3 *Greenl. Ev.*, § 29.)

On the 6th of March, 1858, the general term, first district (composed of Justice Davies, Clerke and Sutherland), rendered a decision granting a new trial in the case of Breen, upon the point here stated, as well as upon another point not necessary to state.

The court below erred in each of the four points specified. A new trial should be granted.

Nelson J. Waterbury (District Attorney), for the defendant in error.

I. Evidence of the character of the deceased was rightly excluded, with the restriction laid down in the first ruling of the court. Such evidence is admissible where, from the facts of the killing, there is a doubt as to its character, for the purpose of establishing the theory of self-defence, in which case it must be brought to the knowledge of the defendant. It is not otherwise admissible. (*Fom. v. Seibert, Whar. Hom.*, 229;

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Queensberry v. State, 3 *Stew.*, 308; *State v. Field*, 14 *Maine*, 428; *State v. Tilley*, 3 *Ired.*, 424; *Com. v. Yost*, 9 *Met.*, 110.)

II. The other testimony excluded was of precisely the same nature, and its rejection must, by natural intendment, be taken to be subject to the same qualification, and there was no testimony offered to bring the subject-matter home to the knowledge of the deceased.

The last offers were also properly excluded, as relating to specific acts, disconnected entirely from the homicide in question. (*See cases cited under Point I.*)

III. The charge of the judge upon the question of self-defence, is not sufficient ground to set aside the verdict.

(a.) An omission to charge cannot be taken advantage of without a request to charge, and the same rule should apply to the remarks of the judge in this case. (*State v. Straw*, 33 *Me.*, 554.)

(b.) In the case of the *United States v. Wilberger* (3 *Wash. C. R.*), the presiding justice charges that the danger must be "apparent," "evident," and "imminent," though it afterward "turn out to have no actual existence," and so our statute requires that the danger shall be imminent.

The language of the judge is to be construed liberally, in view of the fact that his attention was not called to it, and as merely fixing, like the words "imminent danger" in the statute, the *character* of the danger *apprehended* to exist.

IV. Even though the charge be erroneous in this respect, there is no ground for a reversal. The same rules apply to bills of exceptions in criminal as in civil cases, and a verdict will not be set aside for a misdirection which could work no injury. (*People v. Wiley*, 3 *Hill*, 213; *Hagden v. Palmer*, 2 *Hill*, 205; *Shorter v. The People*, 2 *Comst.*, 192.)

There is no evidence anywhere in the case to call for any discretion whatsoever upon the subject of self-defence, and the charge was in that respect wholly irrelevant to the facts of the case, and could not, upon its face, or by intendment of law, work any injury to the defendant. (*Shorter v. The People*, 2 *Comst.*, 192; *Whar. on Hom.*, 212, *et seq. Case, passim.*)

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By the Court, SUTHERLAND, P. J. We are unanimous in the opinion that there must be a new trial in this case. After the jury had been out some twenty-four hours, they returned into court and asked for further instructions on the *law*. The judge who presided on the trial, stated that if they believed the witnesses, they should convict of manslaughter, but it was for them to say in what degree. It was purely a question of fact for the jury to determine as to whether a case of manslaughter had been proved; it was within their province to say whether the prisoner, at the time he slew the deceased, had reasonable ground to believe his own life in danger. Clearly, where a case rests upon circumstances, it is for the jury to construe those circumstances, and say whether they necessarily impute guilt to the defendant, or whether they are consistent with his innocence. To uphold the charge in this case, would be to sustain a principle, the effect of which would be to substitute the court for the jury. We do not deem it necessary to discuss the other points which were argued by the counsel for the plaintiff in error.

Judgment reversed, and new trial ordered.

SUPREME COURT. New York General Term, May, 1859. *Roosevelt, Sutherland and Lott*, Justices.

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In criminal as well as in civil cases, it is within the discretion of the court to receive further evidence on the part of the prosecution after the summing up has been commenced.

THE prisoner was convicted, in the General Sessions of the city and county of New York, of stealing eight \$100 notes of the Mechanics' & Manufacturers' Bank of Philadelphia. On the trial, after the case for the prosecution was closed, the pri-

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soner's counsel objected that no proof had been given of the existence of the alleged bank or the value of its notes, if they had any value, and that his client, on that ground, as matter of law, was entitled to an acquittal. To meet this difficulty, the District Attorney, by permission of the court, notwithstanding the summing up had commenced, was allowed to introduce further witnesses. The prisoner excepted to the ruling, and brought the case on writ of error to this court.

By the Court, ROOSEVELT, P. J. The only question presented by the writ of error, is, does the admission of fresh evidence, at that stage of the trial, constitute a ground for setting aside the verdict of the jury.

The statute (2 R. S., 785), declares that "the provisions of law in civil cases relative to compelling the attendance *and testimony of witnesses, their examination, &c.*, shall extend to trials and other proceedings on *indictments*, so far as they may be in their nature applicable, subject to the provisions contained in any statute." And further, that on such criminal trials, "exceptions to any decision of the court may be made by the defendant in the same cases and manner provided by law in civil causes."

Whatever, therefore, may be the practice in other States, in this we have a precise statute for our guide. Trials on indictments for public offences, are placed on the same footing as trials on complaints for private wrongs.

In civil actions, the plaintiff, ordinarily, is required to introduce all the evidence in support of his side before resting. He cannot afterwards, it is said, supply an omission "as matter of right." (*Leland v. Bennett*, 5 Hill, 286.) But this implies that he may do so as matter of favor; in other words, that it is discretionary with the judge, in view of all the circumstances, to grant the permission or to refuse it; and that no appeal, in such case, lies from his decision. But were the decision appealable, we think it was not erroneous. The judge exercised a sound discretion in allowing the testimony to be introduced. Indeed, had he arbitrarily refused the permission in such a case

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of mere technical oversight, his conduct would have been ju open to criticism.

Judgment affirmed

SUPREME COURT. New York General Term, February, 1859. *Revelt, Davies and Clerke*, Justices.

FRANCIS DIDIEU, plaintiff in error, v. THE PEOPLE, defendants in error.

Form of an indictment for arson in the first degree.

Under an indictment for arson in the first degree, the defendant may be convicted of arson in the third degree, where the offence proved on the trial is the burning of goods, wares, merchandise or other chattels, insured against loss or damage by fire, with intent to prejudice the insurer.

The application to such a case of the statutory provision (2 R. S., 762, § 1) which allows a conviction for any degree of the offence inferior to that charged in the indictment, is not a violation of the sixth section of the State Constitution, which declares that "no person shall be held to answer for a capital crime, otherwise infamous crime, unless on presentation or indictment of a grand jury."

On the trial of an indictment for arson in the first degree, evidence that the prisoner had obtained an insurance on the property burned, is competent on the question of motive.

THIS case came before the court on writ of error to the New York General Sessions, where the prisoner was indicted for arson in the first degree. The indictment was as follows:

City and County of New York, ss:

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath, present:

That Francis Didieu, late of the fifth ward of the city of New York, in the county of New York aforesaid, on the twenty-first day of March, in the year of our Lord one thousand eight hundred and fifty-eight, at the ward, city and

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county aforesaid, with force and arms, in the nighttime of the said day, a certain dwelling house of one Amelia Asselin, then and there situate (there being then and there, within the said dwelling house, some human being), feloniously, willfully and maliciously, did set fire to, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

PETER D. SWEENEY,
District Attorney.

The prisoner pleaded "not guilty," and the issue thus joined came on for trial on the 17th day of September, 1858, before Hon. A. D. Russell, city judge, and a jury.

After proving that the prisoner occupied a room at No. 86 Leonard street, in the city of New York, in which *Amelia Asselin* and others resided, and that a fire was discovered in the room of the prisoner on the night of the 21st of March previous, while the said *Amelia Asselin* was in the house, the prosecution called

John Stillwell, who testified as follows: I am an officer of the fifth ward; was on the corner of Broadway and Leonard street, when the alarm was given, about eight o'clock; I ran across to prisoner's; was told the room was on fire; I went to the room; the door was open; did not see him; saw the flames in the room; called for buckets of water; in about ten or fifteen minutes officer Webb came; after the fire was out, I found in the room two trunks and a box of shoes; no cover on the box; the lids of the trunks were down; saw smoke coming from a crack on the tops of the trunks; the box of shoes was in about centre of room; fire was in the inside of box, none on the outside; also, fire was inside the trunks; did not move in anything from the room except the box; saw places fired each trunk; in the box; in the bed, about the centre, in the blankets; all these fires were distinct from each other; we called in Mr. Baker to investigate the case; found boots and shoes on the wall, partition, and on wall over bed; moved the trunks a few feet, before Mr. Baker came.

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Being *cross-examined* by counsel for the prisoner, he testified: No part of the room or building had been fired; that the box and trunks were apart; there was no communication between them; the floor had not been burned; there was a smell of camphene in the room, and in the trunks and boxes; I extinguished the fire before Webb came; took the box into the yard and emptied it, and put out the fire; took it back again soon.

Jacob Webb was next sworn by the prosecution, and testified: I am a police officer in the fifth ward; got to the fire about fifteen minutes past eight; found there a crowd of people; when the fire was out I went into the room; found at the left side of the room brackets on the wall; fire had been about four feet from the surface; noticed trunks open; fire inside; no fire on the outside; the box was about three feet square; fire all inside, but none outside; found fire in centre of the bed; found no trace of fire from one place to the other; no fire in the stove; a slight burn by window casing near floor; I first saw Didieu and boy with him come to the stoop; they went in; I went into the house; saw Didieu in his room; asked him if he was the owner; he replied, "Yes."

Witness was asked "whether the prisoner on that night did not speak to him about his goods being insured?" To which question prisoner's counsel objected, upon the ground that it was irrelevant and immaterial, and that the indictment contained no count as to prisoner's goods being insured or burnt.

Objection overruled by the court. To which ruling prisoner's counsel excepted.

In answer, witness stated that the prisoner said he was insured for \$800; I asked him when he heard of the fire, and he said he had only just heard of it; I sent Didieu to the station house; returned to the house with the fire marshal; examined the room; found camphene had been spread about the things; saw fire marshal next day find the padlock and two screw eyes; the nosing of the door had been broken.

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Upon his *cross-examination* by prisoner's counsel, he testified : That the room had not been burned ; that the prisoner was a Frenchman ; understood what he said to me.

William A. Edwin was sworn on the part of the prosecution, and testified : I am clerk and book-keeper in the Pacific Fire Insurance Company.

Q. Had your company any insurance on property at 86 Leonard street ?

Objected to by prisoner's counsel as irrelevant and immaterial, and not a proper subject of inquiry, under the present indictment.

Objection overruled by the court. To which ruling the prisoner's counsel excepted.

A. Yes, we had.

Q. When ? For what amount, and on what goods ?

Objected to, upon the ground that a policy of insurance had been given, and it should be produced.

The District Attorney then called upon the prisoner and his counsel to produce the policy of insurance, which counsel said he did not have, and had never seen.

The court overruled the objection, and allowed the evidence ; to which ruling prisoner's counsel excepted.

The book I have contains a transcript of the policy ; it is in my handwriting : " Mr. Francis Didieu, on stock of boots and shoes, \$600 ; household furniture, beds and bedding, \$100 ; on his clothing and linen, \$100 ; contained in the fourth story, brick front, frame, tin roof, part filled in, store and dwelling, situate in this city, No. 86 Leonard street, at one per cent, expiring Dec. 11th, 1858." Don't think any claim has been made for loss ; sixty days is the time to make the claim.

After further evidence had been given on both sides, the prisoner's counsel began to sum up to the jury, when the District Attorney interrupted him, and stated to the court and jury that the evidence would not warrant him in pressing the charge contained in the indictment, because the freehold or no portion of it was burnt, and he would therefore abandon that part of the charge and case ; but would claim that the jury

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could convict the prisoner of arson in the third degree, in burning his insured goods, with the intent to prejudice and defraud the insurance company.

The prisoner's counsel then moved the court for the discharge of the prisoner, upon the ground, that there was no count in the indictment alleging the burning of his goods with the intent to prejudice any insurance company, but only one count for arson in the first degree; and counsel also asked the court to instruct the jury, that the prisoner, under the indictment, could not be found guilty of arson in burning his goods with the intent to prejudice the insurance company; which motion was denied by the court, and to which prisoner's counsel excepted.

The court charged the jury, among other things, that if the evidence warranted it, they could find the prisoner guilty of arson in the third degree, in burning his property, with intent to prejudice an insurance company, or any of the lesser degrees named in statute, notwithstanding he was only indicted for arson in the first degree, and notwithstanding there was no count in the indictment averring that statutory offence in express terms.

To which portion of the charge of the court, the prisoner's counsel excepted.

The jury thereupon found the prisoner guilty of arson in the third degree, in burning his property, with intent to prejudice the insurance company.

A. Oakley Hall, for the prisoner.

I. The indictment was for a simple and not complex crime, to wit: arson of an inhabited dwelling house in the night-time; and the crime of the conviction and sentence was not included therein.

(a.) He was not informed by indictment of any such charge against him as arson in defrauding an insurance company.

(b.) The point is believed to be sustained analogously by this court in *Shepard's case*. (19 N. Y. R., 544.)

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II. The statute permitting a conviction for a lesser degree, under indictment for a superior degree, is to be read rationally. The inferior degree must be generic to the superior.

But arson to defraud an insurance company, is a creation of the statute unknown to the common law, and not included in arson first degree.

The permissive word of the statute is "may"—i. e., if the indictment contains enough to apprise a defendant of the lesser charge, the words are "consisting of."

But section 37, 3 R. S., 989, is to be taken with section 53 of page 109. (*People v. Jackson*, 3 Hill, 94, and cases cited.)

The evidence of insurance policy in furnishing proof of motive, might not be so important for the prisoner to combat as if it were offered in support of the *corpus delicti*; but evidence in illustration and evidence to substantiate present very different considerations of admissibility.

Didieu did not come prepared with his policy even as it appeared, and he may have had witnesses to show that the value of the goods exceeded the value stated in the insurance policy, all of which would have been very material.

III. The essence of the crime for which the prisoner was convicted, is its intent—intent to defraud a company, and this intent should be averred.

(a.) Other kinds of arson may be merely malicious. This is an *avaricious* arson also. (*People v. Henderson*, 1 Park. Cr. R., 563.)

(b.) Where an intent is essential to constitute a crime, that intent must be distinctly averred in the indictment. (*Gore's Case*, 34 N. H., 510.)

IV. The indictment in no wise sustaining the conviction, it should be absolutely reversed.

Nelson J. Waterbury (District Attorney), for the People.

I. Evidence, as to the fact of prisoner having property insured in the house, was admissible, as touching the question of motive. (*People v. Shephard*, 19 N. Y. R., 544.)

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II. The charge of the court is supported by section 38 of Revised Statutes (3d vol., 5th ed., 989): "Upon an indictment for any offence consisting of different degrees, as prescribed in this chapter, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence inferior to that charged in the indictment, or of an attempt to commit such offence."

Burning property insured is arson in the third degree. (§ 5, 3d vol., R. S., 5th ed., 946.)

By the Court, ROOSEVELT, J. The prisoner, Didieu, was convicted, in the Court of General Sessions, of the crime of arson in the third degree, "for burning his property with intent to prejudice the insurance company." A bill of exceptions was taken by his counsel, and returned with the proceedings of the Supreme Court.

The prisoner insists, and it is the main point relied on, that the indictment which he was called upon to answer, did not charge him with the offence of which he was found guilty, and that he was virtually convicted therefor, without being indicted; while the Constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentation or indictment of a grand jury."

The offence charged, it appears, was setting fire, in the night-time, to an inhabited dwelling house, the property "of Amelia Asselin," the penalty for which is death. On the trial, the District Attorney admitted that the proof, although sufficient to establish the burning of the goods, was insufficient to show that any portion of the building was burned. He claimed, however, and the court so held, that the prisoner, having been charged with a higher, might, notwithstanding, be convicted, not of a lesser offence, but of a lesser *degree* of the same offence. And if the statute in relation to offences "of different degrees," is in that respect constitutional, such would seem to be the inevitable result.

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Arson, in all its grades, whatever may before have been its common law character, is now a statutory offence, and "all the common law punishments," formerly applicable to it, are expressly "prohibited." (2 *R. S.*, 701, § 17.) It is declared by the statute to be an offence of four degrees: the first, capital, the other three subject only to imprisonment. The first degree, it is admitted, corresponds with the charge in the present indictment, and the third degree with the offence actually established. (2 *R. S.*, 667, § 4.)

The crime charged was arson by statute, and the crime proved was arson by statute. The essence of the act in either case, was the unlawful setting fire to combustible materials, whether houses or merchandise, endangering the lives or pecuniary interests of others. So, at least, the Legislature have seen fit to regard it. For, instead of creating different crimes, they have divided the cases into different degrees of the same crime, declaring, at the same time, that "upon an indictment for any offence, consisting of different degrees, as prescribed in this chapter (the different degrees of arson are prescribed in it), the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence, inferior to that charged in the indictment, or of an attempt to commit such offence."

It is said, however, that even if the Legislature had power to classify offences, different in their nature, under one general head, and to designate them, however unlike, as different degrees of the same offence, yet they had no power to deprive the accused party of a proper specification in advance of the matters alleged against him. But there is an obvious answer to this objection. The prisoner, being chargeable with knowledge of the law, was bound to take notice that the crime of arson are of different degrees; that under an indictment for a higher, he might be found guilty of a lower degree; that, although charged with setting fire to the building, he might be tried for setting fire to the goods and furniture in the building, even if the building itself (a very unlikely occurrence) should

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escape ignition; and that, therefore, he must prepare himself to meet the charge in all its inferior degrees, not according to his own understanding of degrees, but according to the definitions of the Legislature, "as prescribed in this chapter." When, therefore, he was charged with burning the house, he knew that the charge comprehended that of burning the goods in the house. There are grave objections, no doubt, to this brief and even vague mode of pleading in criminal cases, but I see in them no sufficient warrant for declaring the law which authorizes it void. Nor do I see that any evil to the prisoner has resulted in this particular case. The building in question, it appears, was a four-story tenement house, with brick front only, with families on each floor. In the prisoner's apartment there were a bed and three trunks or boxes. In each of these he placed camphene, which, on being ignited, produced at first a smothered fire, but ultimately a flame. Such an act, it would seem, was scarcely distinguishable in criminality from the first degree of arson. It was setting fire to that which must almost inevitably result in igniting the building. Indeed, one of the witnesses swears that he "saw a slight burn by the window casing, near the floor." Can it be contended that a man who deliberately, in the night time, applies a lighted torch to a bale of hay in a wooden tenement filled with human beings, is not guilty of setting fire to the tenement? The offence, it will be remembered, is not the actual burning of the dwelling, but the setting fire to it.

As to the proof of insurance on the goods or supposed goods, it would seem to have been clearly admissible as showing fraudulent design on the part of the prisoner, or, in other words, to establish the allegation in the indictment, that the act was done "feloniously, willfully and maliciously." If the evidence, then, was admissible, and tended to convict the prisoner of the first degree of arson, as charged in the indictment, what ground has he to complain, that through the leniency of the public prosecutor the jury acquitted him of the offence in that degree, but found him guilty (as the statute expresses it), of a degree of the offence "inferior to that charged."

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Our decision, therefore, is, that the exceptions taken at the trial be overruled, and that the proceedings be remitted to the court in which the trial was had, with directions to proceed and render judgment according to law.

Proceedings affirmed.

SUPREME COURT. Kings General Term, December, 1858. *S. B. Strong, Emott and Brown, Justices.*

THE PEOPLE v. THE LONG ISLAND RAILROAD COMPANY.

THE PEOPLE v. THE BROOKLYN AND JAMAICA RAILROAD COMPANY.

That a fair and impartial trial, by any means within the reach of the law, cannot be had in the county in which the venue was laid, is a sufficient reason for changing the place of trial in a criminal case.

In deciding upon such an application, the court should be governed by the facts shown, and not by the mere impressions or conclusions of parties and witnesses.

It is not indispensable to a change of venue in a criminal case, that there should have been an ineffectual attempt to obtain a jury in the county where the venue was laid.

In these cases, indictments had been found against the defendants, in the county of Kings, for a public nuisance, and the indictments having been removed into the Supreme Court, the defendants moved, on affidavits, for a change of the place of trial. The facts and circumstances sufficiently appear in the opinion of the court.

John Dikeman and J. Greenwood, for the Long Island Railroad Company.

S. E. Lyon, for the Brooklyn and Jamaica Railroad Company.

J. M. Van Cott, for the People.

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By the Court, S. B. STRONG, J. The defendants have moved that the place of trial in these actions should be changed, on the ground that a fair and impartial trial cannot be had in the county of Kings, where the indictments were found, and the facts upon which they are based occurred.

There are reasons for which I would gladly have abstained from expressing an opinion upon the motion, but they are not such as to legally disqualify or exonerate me from participating in the decision, and as my views differ to some extent from those expressed by one of my brethren, I conceive that I am bound to state them.

It is, of course, desirable that trials in criminal cases should be had where the offences are alleged to have been perpetrated. Witnesses for the prosecution often attend reluctantly, and generally without compensation, and if they should be called upon to travel far from their homes, they would be subjected to great hardship, or would abstain from attending, to the great obstruction of public justice. I do not, however, urge that the vicinage, as it is called, is the best adapted for a fair and impartial trial. There is often some personal feeling or local prejudice, which sadly interferes with the due and impartial administration of justice, and sometimes induces strange verdicts, or, what is becoming a serious evil, final disagreements among the jurors. But for the trouble, delay and expense caused by trials at distant or remote places, it would be well that they should take place before jurors to whom the parties, their interests and their feelings, are unknown. It might sometimes subserve the ends of justice that the parties and their witnesses are personally known to the jurors, but the advantage is more than balanced by the undue influence of personal or local considerations, which is often imperceptible to him whom it controls.

A party who moves to change the place of trial from where the law primarily establishes it, must fail, unless he satisfies the court that the ends of justice require it, or at all events will be promoted by it. That a fair and impartial trial by any means within the reach of the law, cannot be held in the county

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where the venue is laid, is undoubtedly a sufficient reason for the change. The people—all men, whatever may be their character or standing, have, when litigating, a right to a trial by an unprejudiced jury. Many unbiased and competent jurors can be found in any county of this State, in any conceivable case, but the questions in these applications is, whether such can be procured by the method provided by law? Ordinarily there are no means of selection. The requisite number is drawn from the county box, and the persons named on the ballots must be summoned, whether competent and unbiased, or otherwise. Even when select jurors are ordered, the county clerk names forty-eight, and neither party has any voice in the matter, except to strike out twelve of the number. Where there is a widely extended bias, its application to individuals cannot be well known until they are interrogated, and therefore these methods of obtaining impartial jurors are very imperfect.

Still the court should not lightly adopt or act upon the opinion that a fair and impartial trial cannot be had in the county where the events which gave rise to the complaint are alleged to have happened. Facts, and not the mere impressions and conclusions of the parties or their witnesses, should be considered, and should control. Parties generally, and their friends frequently, imbibe strong opinions from inconsiderable causes, and it is unsafe to place much reliance upon them. But there cannot well be any serious misapprehension as to the existence of facts, especially where they are of a public nature. The principal question is as to the inferences to be drawn from them.

It is said in *Messinger v. Holmes* (12 Wend., 209), that the place of trial should not be changed by reason of popular excitement or prejudice, until after an ineffectual trial in the county where the venue had been originally laid. But in a subsequent case (*The People v. Webb*, 1 Hill, 179), it was decided that the venue might be changed in a criminal case, where the evidence of public excitement against the applicant was strong, although there had been no actual experiment

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made by way of trying the cause, or even impanneling a jury, where it had been originally laid. The learned judge who gave the opinion of the court in that case, remarked, and I think correctly: "To make such an experiment essential, would seem to be quite dangerous. It is the very thing which the law seeks to avoid, where it is seen that the party may, and probably will, be drawn into a trial by a jury who, under an influence of which they themselves may be hardly conscious—an influence which, perhaps, no human sagacity can detect—may pronounce a verdict against him, and conclude his rights forever." True, in a case where a verdict is palpably against the weight of evidence, a new trial may now be granted, but the evil of even an unjust conviction cannot be easily cured.

The character of an innocent man may suffer, and he may be subjected to great trouble and expense. The venue was changed in the case of *The People v. Webb*, in consequence of an excitement against the prosecutor, created by publications from the office of the defendant. The case was by no means as strong as this is represented to be, although there is a considerable resemblance in the minor features. There was another decision of the late Supreme Court which was not reported, by which the venue in several actions, which I (as a member of the bar) had instituted against the Long Island Railroad Company, was changed from the county of Suffolk, by reason of alleged prejudices against the company, to the county of Richmond, although there had been no attempt to try either of them. The objection that there had been no trial was strenuously urged in those cases, but it was unhesitatingly overruled.

In a case where there had been an actual experiment and a failure to obtain a just verdict, clearly traceable to undue excitement against the unsuccessful party, that would go far to show that a trial should be had elsewhere. Even a failure to obtain any verdict, is not, however, conclusive evidence, when attributable to popular excitement, that it prevails to such an extent as to require a change of the place of trial, as was decided in the case of *The People v. Bodine* (7 Hill, 181). In

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that case, however, there was an actual necessity for the change, as subsequent attempts to try the defendant in Richmond county and in the adjoining county of New York, proved ineffectual. In the late case of *The People v. Baker*, where I changed the place of trial on an indictment for murder, although I referred to two unsuccessful trials in the county where the venue was laid, yet I relied much more upon the causes and other evidence of popular excitement. I do not understand Judge Parker as repudiating, in the late case of *The People v. Wright* (5 *How. Pr. R.*, 28), the doctrine of the late Supreme Court in *The People v. Webb*, and the later cases to which I have alluded. He says that an actual unsuccessful experiment is not the only admissible proof to sustain the allegation of undue bias in the county where the venue is laid. He does, indeed, refer to the case of *The People v. Webb* as the only one cited, or which he had found, in which a change of venue had been granted, on the ground of excitement without a previous attempt to impanel a jury. But he canvasses the proof in the case before him very closely, and relies upon its insufficiency to show the fact as the ground of his decision, which would have been unnecessary if the technical objection had been fatal.

The main allegation in the case under consideration is, that there is a strong and controlling excitement against the defendants, upon the principal question involved in these controversies, in the city of Brooklyn, caused, principally, by those who had been instrumental in procuring the indictments. It is not averred, or, so far as the papers go, even supposed, that it prevails in the rural parts of the county. According to the census of 1855, the population of the city of Brooklyn was 205,250, while that of the other towns in the county was 11,105. Comparatively, the number of jurors from the rural districts must be very small. In an ordinary panel, there would not probably be enough to constitute a single jury. Even if a jury could be selected from the county, there could not be more than one from the entire panel, and the other cases

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would have to be tried by Brooklyn jurors, or go over to another term.

If, therefore, the objection to the jurors extends no further than to the residents of Brooklyn, still, if it prevails generally as to them, it is enough to call upon us to change the place of trial. Several facts have been stated to show that there is a strong excitement and a hostile feeling against the defendants, in reference to the charges of nuisances contained in the indictments, prevailing extensively not only among the residents along Atlantic street, but extending through the entire city. Before any action by the common council against the defendants, meetings of the inhabitants were called by hand-bills and notices posted up in many public places in the city and in the ferry boats. In some of them there were such expressions as the following: "Odious railroad monopoly;" "Running the filthy manure cars;" "Obstructing the street with a tunnel;" "Tremble, tyrants, when you read the doctrines of our inalienable rights;" "They have usurped possession of the streets without any legal right;" "This locomotive nuisance;" "The people cannot be silenced forever;" "Its locomotive rushes wildly on, destroying all before it! the victims! the victims!" "Only thirteen Irishmen and one Dutchman have been killed by this railroad;" "The widows and orphans—who can depict the result in widows and orphans?" "The widows and orphans by this road since it crossed our street;" "The railroad insists upon running the locomotives in our streets, regardless of life! blood! blood! more blood!" One of the meetings was called to consider "Why South Brooklyn should be destroyed by nuisances?" "Why this railroad is suffered to run over, mangle and kill citizens, without conscience?" "Why horses and vehicles are run down, crushed and destroyed in our streets without compensation?"

It appears from one of the papers submitted to us, that at one of the meetings called by a public advertisement, to which, according to a statement in one of the affidavits, several thousand names were subscribed, and held in the large hall at the Atheneum, every seat in the hall was filled, and that the pre-

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sident and three of the vice-presidents were ex-mayors of the city, and there were twenty-seven other vice-presidents, among whom were many gentlemen of high standing and extensive influence; an application was made to the common council to abate the alleged nuisance. The matter was referred to a committee, which held several meetings in a large room, which was closely crowded. The audience was disorderly, and according to the affidavits presented by the defendants, many, and according to the affidavits in behalf of the prosecution, a few of the spectators hissed when the counsel for the defendants were addressing the committee. A report was made decidedly unfavorable to the defendants, and the common council, in accordance with the report, adopted a resolution condemning the use of Atlantic street by the defendants as a public nuisance. There was no statement of the votes of the members of the common council among the papers presented to us, but a majority of the aldermen, representing a large part of the entire city, must have concurred in the condemnation. The report of the committee and the concurrent ordinance of the common council, were extensively published in the city papers. Subsequently, complaints were made to a grand jury, composed, doubtless, principally of inhabitants of the city of Brooklyn, and the same grand jury found six indictments against the Long Island Railroad Company, and three indictments against the Brooklyn and Jamaica Railroad Company. Why so many indictments were found for the same offence, for the road is actually used only by one of the companies, was not explained to us. Among the papers presented to us, is a copy of a petition signed by thirty-five persons, containing strong representations against the conduct of the defendants, which was addressed to the grand jury, and is said to have been received by them. This was all wrong, and would, if properly noticed, have gone far to vitiate the indictments. At the late State election, the candidates in Brooklyn for the two seats in the Senate, and the seven seats in the Assembly, were catechised by a committee upon the subject of allowing the defendants to continue the alleged nuisance, and all avowed their opposition to it. These

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and such as these are the facts presented to us by the defendants in support of their motion. They are not controverted to any considerable extent by the prosecution. There is an affidavit by the District Attorney, and there are several affidavits by others, many of whom have been instrumental in procuring the indictments, expressing a strong impression of those making them, that an unbiased jury can easily be obtained in the county of Kings. There are no facts stated, and from the nature of the case it could not well be expected that any should be stated to show that no prejudice prevails generally in the city of Brooklyn against the defendants upon the question involved in this controversy.

Taking into consideration all the circumstances, it seems to me that the defendants ought not to be tried by a jury consisting, as it must, if taken from the body of the county, principally of the citizens of Brooklyn. I have every confidence in the intelligence and devotion to justice of the jurors of that city. But they may, and possibly have, imbibed strong predjudices upon a subject of great public interest, and no one is willing to be tried by jurors prejudiced against himself or his interest, however respectable and well informed they may be. That the residents on a long and populous street, extending from the South Ferry to Bedford, are warmly and actively opposed to the defendants in this controversy, and thus are disqualified from acting as jurors, there can be no doubt. A feeling operating through such an extended locality, is apt to prevail much further through the influence of business connections, family ties and friendly intercourse. That it has extended itself through a large portion of the city, is apparent from the large public meetings, the action of the common council, composed, as it is, of representatives of the whole city, and possibly the multiplied action of the grand jury. I do not mean to say that in all this the citizens or the common council or the grand jury have erred, but it does seem to me, with the greatest respect for all of these bodies, that the conduct of the public meetings and the people's representatives, indicates a foregone conclusion against the defendants, which renders it proper that

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the questions to be tried in these cases, should be submitted to jurors to be selected from another community.

The District Attorney objects principally on the ground that a trial in another county would subject the witnesses for the prosecution, who, he says, are numerous, to great inconvenience, and yet he states in his affidavit that the cases will be decided principally, if not wholly, upon a question of law. If he is right in that, there cannot be any urgent necessity for the attendance of many witnesses. We are not informed by the papers before us, nor do I know from any source, what particular questions are involved in a general charge brought against the defendants.

It is so well understood, that I think we may take judicial notice of the fact, that the inhabitants of our cities generally suppose that the use of steam in propelling locomotives through their streets, is so far obnoxious that it is unjustifiable. If that should be the ground of complaint, or if, in addition to that, it should be contended that tunneling a street for railway purposes was illegal, but few witnesses would be necessary. These are the only questions of law which, so far as I understand the cases, will be probably involved on the trial.

The District Attorney objects to sending the cases for trial to either of the other counties on the island, on the ground that the popular feeling there is in favor of the use of steam on the railroad in Brooklyn. The evidence to prove the existence of such favorable feeling among the inhabitants of those counties, is inferior to that going to show the prevalence of hostile feelings in the citizens of Brooklyn; but still I am not inclined to change the place of trial to either Suffolk or Queens county. It is better that the cases should be tried where there is clearly no popular bias or prejudice which might interfere with the due administration of justice.

The court house in the county of Westchester is not distant from Brooklyn, and with the present conveniences of traveling furnished by the railroads, there can be no great inconvenience or heavy expense incurred in taking the witnesses to White Plains. For the reasons I have assigned, but certainly from

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no distrust of the intelligence or ordinary impartiality of the jurors of the county of Kings, I am inclined to change the place of trial in the cases under consideration, into the county of Westchester. Liberty should, however, be given to the public prosecutor and the defendants to select any other county by mutual consent.

Motion granted.

SUPREME COURT. At Chambers. New York, August, 1860. Before
Sutherland, Justice.

THE PEOPLE v. CATHARINE FORBES.

Satisfactory evidence that a female is "a common prostitute and idle person," will not authorize her conviction as a vagrant under the statute.

"Common prostitutes" and "idle persons" are not necessarily vagrants; it is only "common prostitutes who have no lawful employment whereby to maintain themselves," and "idle persons who, not having any visible means to maintain themselves, live without employment," that come within the vagrancy acts.

These acts are constitutional, but should be construed strictly and executed carefully in favor of the liberty of the citizen.

Where a person is committed as a vagrant, the record and commitment should set forth the grounds on which the charge of vagrancy was based. (a)

CATHARINE FORBES had been committed as a vagrant by one of the police justices of the city of New York. The commitment showed that she had been convicted of being "a common prostitute and idle person." She was brought up, on *habeas corpus*, before Mr. Justice Sutherland, at chambers, who, after hearing counsel, delivered the following opinion, and discharged the prisoner :

SUTHERLAND, J. The warden of the city prison returns to the writ of *habeas corpus* allowed by me in this matter, a copy of the warrant of commitment under which the prisoner was

(a) See *vide* the next case, *The People v. Gray*.

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received into his custody, and by virtue of which she is held and detained.

After hearing counsel, and after giving to the subject the most serious consideration called for, as I thought, by its great importance and public interest, I have come to the conclusion that the warrant of commitment, on its face, is absolutely void, and that the prisoner must be discharged, on the ground that it does not appear on the face of the commitment that the prisoner had been duly convicted of being a vagrant, or, indeed, that she has been convicted or committed for any offence or crime whatever.

The question on the face of the commitment arises in this manner: The warrant of commitment (which is under the hand and seal of Mr. Quackenbush, one of the police justices of this city), not only in due form recites the conviction of the prisoner, on competent testimony, of being a vagrant, but proceeds to state and specify the facts, circumstances or conditions which made or constituted the prisoner a vagrant, and on competent proof of which it must be assumed that the committing magistrate determined that the prisoner was a vagrant.

The words of the commitment are: "Whereas, Catharine Forbes stands charged, and is, on competent testimony made before me, lawfully convicted of being a vagrant—in this, to wit: that she is a common prostitute and idle person, of which conviction a lawful record in due form has been made and filed, and it appearing to me, for the cause aforesaid, that she is a vagrant within the meaning of the statute, &c., I do decide and determine that she be committed," &c.

The commitment then, on its face, presents this question: Did competent and satisfactory testimony that the prisoner was a common prostitute and idle person, authorize her conviction and commitment as a vagrant? [There was no such common law offence or crime as vagrancy and idleness.] By certain statutes, all persons coming within a certain description defined and declared by the statutes, are declared to be vagrants, and provision is made for their trial, conviction and imprisonment. We have two such statutes. By the Revised Statutes (2 R. S.,

879, 5th ed.), all idle persons who, not having any visible means to sustain themselves, live without employment; all persons wandering about and lodging in taverns, groceries, or beer-houses, outhouses or market places, sheds or barns, or in the open air, and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways or other public places to beg or receive alms, shall be deemed vagrants. Common prostitutes, as such, are not named in this statute, and although they may be, and are, perhaps, most likely to be, or to become vagrants within the description of the statute, yet it is plain if a common prostitute is lawfully convicted of being a vagrant under this statute, she must be so convicted not merely on her confession, but on competent testimony that she is a common prostitute or an idle person. This statute does not declare common prostitutes as a class or by name to be vagrants, nor does it declare all idle persons to be vagrants, but only such idle persons as live without employment, and yet have no means to maintain themselves. By an act passed January 23, 1833, which, from its title and provision, would appear to be confined in its operations to the city of New York, "All common prostitutes who have no lawful employment whereby to maintain themselves," are declared vagrants. It is presumed that the prisoner, Catharine Forbes, was arrested and convicted under this act; but by this act common prostitution is neither defined nor declared to be a crime. By this act a certain class or description of common prostitutes are declared to be vagrants. Every word which defines this class, or makes a part of this description, is material and important.

The magistrate, in acting under the act, had no right to disregard one word of that description. He has no right, I think, to say or determine that a common prostitute is a vagrant within this act, merely because she is also idle or an idle person, without proof of any other fact or circumstance. To be a vagrant within this act, the common prostitute must be without any lawful employment whereby to maintain herself.

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These words imply, I think, something more than being idle, or in an idle condition, and probably something more even than habitual idleness. They imply, I think, a want of any lawful business, occupation or means whereby to sustain herself. It is plain that, substantially, the same words as used in the Revised Statutes in describing the kind or class of idle persons declared to be vagrants, mean something more than mere idleness, otherwise the statutes would have declared all idle persons to be vagrants. The object of this act is not to punish common prostitutes as a sin or moral evil, or to reform the individual, but to protect the public against the crimes, poverty, distress or public burdens, which experience has shown common prostitution causes or leads to.

These statutes declaring a certain class or description of persons vagrants, and authorizing their conviction and punishment as such, as well as certain statutes declaring a certain class or description of persons to be disorderly persons, and authorizing their arrest as such, are in fact rather of the nature of public regulations to prevent crime and public charges and burdens, than of the nature of ordinary criminal laws prohibiting and punishing an act or acts as a crime or crimes.

If the condition of a person brings him within the description of either of the statutes declaring what persons shall be esteemed vagrants, he may be convicted and imprisoned, whether such a condition is his misfortune or his fault. His individual liberty must yield to the public necessity or the public good; but nothing but public necessity or the public good can justify these statutes, and the summary conviction without a jury, in derogation of the common law authorized by them. They are constitutional, but should be construed strictly and executed carefully in favor of the liberty of the citizen. Their description of persons who shall be deemed vagrants is necessarily vague and uncertain, giving to the magistrate in their execution an almost unchecked opportunity for arbitrary oppression or careless cruelty. The main object or purpose of the statutes should be kept constantly in view, and the magistrate should be careful and see, before convicting, that

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the person charged with being a vagrant is shown, either by his or her confession, or by competent testimony, to come exactly within the description of one of the statutes. (See opinion of Edmonds, Circuit Judge, in the *People v. Phillips*, 1 *Park. Cr. R.*, 95.) In this case there is not the least ground for supposing that the committing magistrate's proceedings were not in good faith, and with the sole view of conscientiously discharging his duty. But no record of the conviction has been produced, and by an affidavit made in this matter, it appears probable that none has been filed in the clerk's office of the Court of Sessions, as required by the act of 1833, and the act of April 10, 1835, amending it; and I can therefore only look to the warrant of commitment to see whether the prisoner was lawfully convicted of being a vagrant, or of any crime or offence. For the reasons above stated, I think the commitment on its face does not show that the prisoner was lawfully convicted of being a vagrant, or of any offence or crime. No statute of this State has yet declared common prostitution or idleness to be a crime, and I think, for the reasons above stated, that the determination of the magistrate—that proof that the prisoner was a common prostitute and idle person, authorized her conviction as a vagrant—was erroneous.

The prisoner, therefore, must be discharged.

SUPREME COURT. At Chambers. New York, September, 1860.
Before *Ingraham*, Justice.

THE PEOPLE *v.* WILLIAM GRAY.

Where a conviction of vagrancy before a police justice is reviewed on *habeas corpus* before a judge at chambers, the only inquiry should be, whether the justice had jurisdiction of the prisoner, and whether the prisoner was committed for an offence within the statute.

The offence consists in being a vagrant; and it is not necessary that the record or the commitment should state the grounds on which the charge of vagrancy was based. It is enough that they show that the prisoner had been charged with being a vagrant, and was convicted of that offence.^(a)

THE prisoner was brought before Mr. Justice Ingraham, at chambers, on *habeas corpus*, and his discharge claimed, on the ground that enough did not appear on the face of the commitment to authorize his detention. The facts are fully stated in the following opinion :

INGRAHAM, J. The prisoner was committed by a police justice, on the ground of his having been convicted of being a vagrant, viz., an idle person not having visible means to maintain himself, and an habitual drunkard.

He is now brought before me on *habeas corpus*, and his discharge asked for on the ground that the commitment is not for any offence punished by statute.

The practice of reviewing convictions before justices on *habeas corpus*, is not to be commended. The statute provides another mode for correcting the errors of the justice, which should be resorted to. If the commitment is irregular, and the justice has jurisdiction of the matter, no relief should be afforded in this proceeding.

It is apparent, therefore, that I should only inquire whether the justice had jurisdiction of the prisoner, and whether he has committed the prisoner for an offence defined in any of the statutes of the State. I think there can be no doubt on both

(a) See last preceding case, *The People v. Forbes*.

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points. The jurisdiction of the justice making the commitment is not disputed.

The offence of which the prisoner was committed is stated as follows, viz.: "Who stands charged before me with being a vagrant, viz., an idle person, who, not having visible means to maintain himself, and is an habitual drunkard." The confusion of the sentence arises from the use of a printed form of commitment, and erasing part, so as to insert another grade of the same offence, as provided by the statute.

By the Revised Statutes (*vol. 1, 602*), an idle person who, not having means to maintain himself, lives without employment, is to be deemed a vagrant. In the present case, the words "lives without employment" are erased from the commitment.

By the act of 1833, "a person who, being an habitual drunkard, is destitute and without visible means of support," is to be deemed a vagrant. In this case the words "is destitute" are stricken out.

If it were necessary that all the matters required to be proven should be stated in the commitment, then neither offence is fully stated therein. But I am of the opinion that it is not necessary that the commitment should state all the particulars necessary to make out the offence. The offence is being a vagrant. The justices state that the prisoner has been charged with being a vagrant, and was convicted on competent proof. This is sufficient to show the offence charged and the conviction. (*See People v. Moore, 3 Park. Cr. R., 465.*)

In a commitment for petit larceny, it is enough to state that offence without reciting the goods stolen or the owner of the property. In the *People v. Cavanagh* (*2 Park. Cr. R., 660*), the general term of the second district held that a commitment which recited that the prisoner was convicted of a misdemeanor, was sufficient, and a more particular statement of the offence need not be made.

Even if a contrary rule had been adopted prior to 1855, since that time the mode in which the record of conviction is directed to be made up, would render such recital unnecessary.

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That act (*Sess.* 1855, *ch.* 268), directs the form of the record of conviction to be in this respect as follows: "That the prisoner was brought before the justice on the charge of being a vagrant, and that upon diligent inquiry, &c., it appearing that the said prisoner is a vagrant within the provisions of the statute, I, the justice, did so adjudge," &c.

The commitment is sufficient if it follows the record, and when it is not required that the justice should insert in the record the particular grounds on which the charge of vagrancy is based, it cannot be necessary to recite them in the commitment.

The words defining the particular causes of vagrancy, may therefore be regarded as surplusage, and the charge of being a vagrant and being committed thereof is sufficient.

The prisoner is not without means of reviewing the judgment appealed from, and I do not feel at liberty, under the proceeding, to review that trial. At any rate, I am not willing to discharge a prisoner because the facts necessary to be proven are not recited in the commitment.

I concur with the views of Mr. Justice Sutherland, in the case of Catharine Forbes, so far as they are expressed, as to what is necessary to be proved in order to make out the offence, and unless, on a review of the case, it should appear that all the facts necessary to constitute the offence are proven, the conviction should be reversed; but as I do not consider that all such facts should necessarily be recited in the commitment, I feel bound to remand the prisoner, on the ground that the commitment is regular on its face, and the decision of the justice cannot be reversed in this proceeding.

The prisoner must be remanded.

SUPREME COURT. Albany General Term, September, 1859. *Wright, Gould and Hogeboom, Justices.*

JOHN WILSON, plaintiff in error, *v.* THE PEOPLE, defendants in error.

To constitute the offence of murder under the first subdivision of the fifth section of the statute, entitled "Of crimes punishable with death" (2 R. S., 657), an actual intention to kill must in all cases be proved. Without such an intention, the act can be no more than manslaughter.

Such intention may be inferred from the circumstances under which the violence was inflicted, and sometimes from the act itself; but the onus of establishing it rests upon the prosecution.

The "heat of passion" mentioned in the statutory definition of manslaughter, affords the intended protection to the accused, whether it was produced by acts or words, if the provocation was such as was naturally calculated to produce it.

On a trial for murder by violence, it is not competent for physicians, who made the *post-mortem* examination, after having described the appearance of the wound to the jury, to give their opinions in evidence as to the kind of instrument by which the wound was caused.

On a motion before the Court of Oyer and Terminer, in behalf of the prisoner, for a new trial, on the ground of irregularity, affidavits of counsel, as to information they have received from jurors concerning what took place in the jury room, cannot be received as any evidence of the alleged irregularity.

It is no reason for setting aside a conviction for murder, on motion for a new trial, that during a recess of the trial, one of the jurors took up and examined a piece of the skull of the person alleged to have been murdered, which was lying on the District Attorney's table, the circumstances of the case being such as to show that the juror could not have been misled thereby, and the fact of the juror having examined the said skull being known to the prisoner's counsel before they entered upon the defence.

Affidavits of jurors cannot be received to show that, at the request of one of their number, a constable handed him a paper, on which were marked the several punishments fixed by law for the different degrees of manslaughter.

And when such fact was shown by the affidavit of the constable, the court refused to set aside the verdict, it appearing affirmatively that the jury could not have been misled thereby.

Sentence of the prisoner on a conviction for murder.

THIS was a writ of error to the Court of Oyer and Terminer of Albany county. The prisoner had been indicted for the murder of Patrick McCarty, and pleaded not guilty. He was tried before Mr. Justice Gould and the justices of the Sessions,

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at a term of the Oyer and Terminer, commencing on the 15th of February, 1859.

The District Attorney upon the trial called as a witness, on the part of the People, *Dexter Potter*, who testified: I reside at Ticonderoga; in October, 1858, I was engaged in boating, from Port Henry along the Northern canal; was captain of the boat "P. M. Baker;" knew Patrick McCarty; he was a hand on my boat on 20th of October last; on the morning of October 20th, 1858, my boat lay about her length below the railroad bridge at West Troy, in the town of Watervliet, in the county of Albany; the Armenia of Crown Point, another boat, was there also; one boat lay with her stern under the railroad bridge; I can't call the name; a western boat came down and was snubbed to that boat; of this boat I heard the name, but do not recollect it; I had known prisoner; I believe he was a hand on one of these two last boats; on the morning of October 20th, 1858, I saw Patrick McCarty on my boat alive, at West Troy; the next that I saw him was, as near as I can judge, about three hours after that; we fished him out of the canal; he was pronounced dead; I there saw a cut on the back side of his head; I heard the cry of "a man overboard;" I saw Wilson, standing on the dock; think prisoner is the man, Wilson, I then saw there; at the time I saw McCarty on the bow of my boat, I stepped on to the dock off my boat to go and clear up the tow line of my boat from the deck of the western boat; I was then some eighty or ninety feet from my boat; I went no further off; I heard some words pass between a man on the western boat and Captain Belden; I did not see the man; I remained five or ten minutes under the railroad bridge, when I heard the cry of "man overboard;" I ran back to my boat; saw a hat in the water floating with current near the stern of my boat; a black hat; I thought a Kossuth hat; I saw no body arise from the water; have seen this hatchet before. (Hatchet was here shown to witness.) It was on my boat before this occurrence for a month; might have been longer.

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The evidence in regard to the hatchet was objected to, as irrelevant and immaterial. The objection was overruled by the court, and defendant's counsel excepted.

While I was near the railroad bridge, I heard a conversation between McCarty and a man on the western boat; it was a moonlight night, with a little fog in the morning; it was between two and three o'clock in the morning, McCarty had been seven or eight days on my boat.

The same witness, upon *cross-examination*, testified: I have known McCarty about twelve years; he was from 35 to 38 years old; he had worked on the canal and at grocery tending; did so for Mr. Quinn; he kept assortment; sold liquors; the last I saw of McCarty he was standing on the bow of my boat; bow was to the north; current runs south; the western boat was north of mine; the hat was floating between my boat and the dock; there was twelve or thirteen feet space between the two; found no one on my boat when I got on it; as I got on to my boat, I passed a man standing on the dock; I took him to be Wilson; I recollect seeing but one man there; others came from the bridge right behind me; I saw no one there; might or might not have seen any one else, if there.

Oliver Ormsby testified: I reside at Ticonderoga; I was at West Troy, October 20th, 1858; was a boatman; was then just below railroad bridge; I was a hand on the boat *Armenia*; knew Patrick McCarty; saw him on the bow of Potter's boat, the "P. M. Baker," at West Troy, in the town of Watervliet; I was on the dock, thirteen or fourteen feet from McCarty; after that I saw him after he was taken out of the water; there were four boats there, two northern; I did not before that know Wilson; can't say as to my seeing him that morning; after seeing McCarty on the bow of the boat, I went forward with Potter to clear the line; went eighty or ninety feet forward; while there, heard conversation between McCarty and some one on the western boat that came down and snubbed alongside of boat that lay ahead of us; there were two western boats, one going north and one going south; the conversation came from the latter (the one coming from the west); I don't know which

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boat Wilson was a hand aboard; I heard some one on that boat call McCarty "a whisky head," and McCarty returned the compliment; I heard them dare each other ashore, or say they would like to have each other ashore; I heard some one on the western boat speak to Captain Belden; he was captain of the Armenia; nearly ten minutes, five or ten minutes after that I heard the cry of "man overboard;" I ran back to stern of Armenia; I saw a man there; I can't say who he was; I think I saw that man the next morning down at a grocery north of the weigh lock; they called him Wilson; this (prisoner) is the man; I saw McCarty after he was taken out of the water; observed a wound on him near the top of his head, along by his back; it was a moonlight night.

The same witness, upon *cross-examination*, testified: Can't say that I heard all that passed between the man of the western boat and McCarty; I think it did not last till the cry of "man overboard;" can't tell who the man on the western boat, jawing with McCarty, was; threats of fighting passed between them three or four times; the man I passed on the dock I did not then know; I saw him distinctly enough to know him if I saw him again; I was within two or three feet of him; I next saw that man at the grocery, and that man was the prisoner; I went to assist in looking for McCarty; others came up behind me; this was at two or three o'clock, A. M.; moonlight; a very little foggy; can't say whether a full moon; it was clear, except the fog; could distinguish a man's features nearly fifteen feet; it was three hours before the body was found; it was a half or three-quarters of an hour after the body was found that I saw prisoner at the grocery; think they had arrested him; had not seen him till then, after I saw him, as I thought, on the dock; can't say whether the man I saw on the dock went with us to search for the man overboard; I don't remember his going; the cry of "man overboard" came from the stern of our boat; saw no one there but the man on the dock.

Theodore Belden testified: I was at West Troy, October 20th, 1858; was boating; was captain of the Armenia; I knew

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McCarty; saw him that morning above the weigh lock, this side of the railroad bridge; he was on the dock the first time I saw him; the next time I saw him he was on the bow of the P. M. Baker; last saw him when taken out of the water; I did not then know Wilson; I saw him that afternoon after he was arrested; I heard a conversation between McCarty and some one on a western boat that came down from the west and snubbed; think it was Louis' boat; the conversation was a quarrelling one; the man on the western boat called McCarty "a whisky head;" next thing I heard was the cry of "man overboard;" this was five or ten minutes after conversation; the conversation had ceased before I heard the cry of "man overboard;" when I heard this cry I was on the bow of my boat; I ran back to the stern; when I got there, three or four were there ahead of me; we went to looking for Mr. McCarty, as he was not there; Potter, Ormsby, I and a man off the western boat searched; the last man got there after I did; we found nothing of McCarty; we called him by name; neither found him nor heard anything of him; about seven, or between six and seven o'clock, A. M., we found McCarty near where the boats lay at the time we commenced looking for him; I discovered a wound on his head.

The same witness, upon *cross-examination*, testified: When I heard the quarrel I was on the bow of my boat; can't say how far from Ormsby; fifteen feet, I should think; twenty or thirty feet from the man on the western boat, and forty or fifty from McCarty; can't say whether Ormsby took his coat off to fight or not; I was engaged, and did not pay much attention to what was said during the quarrel; as soon as I heard the cry of a "man overboard," I went to work to help find the man; there was a man on shore attending on the stern line; a man from the western boat came down after I did, and assisted in searching; I saw but one man on the western boat, and one ashore with the line; the man that was tending the stern line of the western boat, was one that came down behind me; the man that came down behind me from towards the western boat, to search for the body, was not the prisoner; the alarm was

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given from the stern of my boat, or the dock by it; I had some words with a man on the western boat.

Spencer Bitgood testified: I am a boatman; was in October, 1855; was at West Troy on October 20, 1858; had charge of the "H. Pease," of Rome; was going west; was there between two and three o'clock, A. M.; was there when the other western boat came down; she got there between two and three o'clock, and snubbed on the middle cleet of my boat; this boat was named "John Van Antwerp;" the morning was moonlight; I could read the Van Antwerp's name on her; she snubbed at three o'clock, A. M.; when I came on deck there was a man on my deck holding fast the stern line of the Van Antwerp, I went up to him and commenced conversation with him; I had seen him before; his name was Galligan; some quarrelling was going on; I saw a line taken from the bow of Van Antwerp, across one of the northern boats (or the way they lay across both), and passed to some one on shore; can't tell who it was took the line across; heard quarrelling below; I went to stern of my boat, and saw two men stand on the dock opposite the stern of the northern boat that lay next to the dock; then I saw two men near the stern of my boat trying to clear some lines, and then in a minute or two, or may be five, I heard some halloo "man overboard;" Gilligan jumped off; I jumped off behind; the man of northern boat ran ahead of us; when I got down there a man stood on the dock, and said, "we were a damned smart lot of captains to let a man fall overboard and drown;" I saw the man who said this the next morning where the corpse was; he was the prisoner; I saw McCarty when found; saw the wound.

The same witness, upon *cross-examination*, testified: My boat lay next to dock, heading west or north; the "Van Antwerp" lay outside of me, heading the other way; the man on the bow of the northern boat outside was trying to get his boat into dock; I saw two men on dock; I saw three men then, one on bow of northern boat; the jawing stopped five or ten minutes; there was no jawing when I heard the cry of "man overboard;" when I heard this cry, I was not looking that way; I

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supposed the fuss was over; Gilligan and I and two captains then searched for the missing man; think I did not notice Wilson there after the remark he made; I did not stay during all the search; I was six or eight feet from letters on "Van Antwerp;" could have read them, and great deal further; it was very light; had been foggy; fog cleared off.

John Gilligan testified: On October 20th, 1858, was a hand on "J. Van Antwerp;" had come from Buffalo; we got to West Troy; Martin Kiley, John Wilson, the prisoner, and I and Conradt Vettick and a boy, were on that boat; Vettick acted as captain of the "Van Antwerp;" she got there about three o'clock, A. M.; she snubbed along side of the "H. Pease;" we had both lines out on her, then Kiley and Wilson got the bow line ashore; then they had words with captains and hands of the northern boats; I heard Wilson call McCarty "a whisky head;" I knew McCarty; saw McCarty taken from the water.

The same witness, upon *cross-examination*, testified: Kiley and Wilson put the bow line across the bow of the boat next the dock—the *Armenia*; not the one where McCarty was; heard McCarty say he wanted to lick some monkey that was on board that boat "Van Antwerp;" I heard no reply to that; don't know whom McCarty meant; I went ashore to see about lines; Kiley and Wilson let the line go; I met McCarty on the *Armenia*; spoke to him; he went back to his own boat, and I went to "H. Pease" to take care of my line; don't know where Wilson then was; Kiley was by the snubbing post; I stayed on "H. Pease" a very few minutes; I heard Wilson halloo "there is a man overboard;" I jumped off and went down; I don't know where Wilson was when he halloed; I did not see Wilson down there when I first went down; I saw Potter and Ormsby in half a minute after I got there; I saw Wilson with a pole in his hand looking for McCarty; I remained there fifteen or twenty minutes; Wilson stayed there as long as I did; Potter had the pole; Wilson and I went down to side cut together; were there fifteen or twenty minutes and then went back to the boat; Wilson was arrested about nine A. M.; he had remained about there until he was

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arrested; don't know where Wilson was at the time the body was found; Wilson had been on duty all night.

Conrad Vettick testified: In October, 1858, I was boating on the boat "John Van Antwerp;" hands were John Wilson, the prisoner, Martin Kiley, John Gilligan; I was captain sometimes; boat came there from Buffalo; arrived at West Troy at three o'clock, A. M., October 20th, 1858; I stood on the dock when the boat was snubbed; John Wilson halloed; he wanted to come in close to the dock; then McCarty said he wanted to go out; Wilson said: "Shut up your damned whisky head;" I did not hear McCarty say a word; then John Wilson jumped off our boat and jumped on to the northern boat, and from that boat on the next; then he jumped on the heel-path of the canal (dock); then he walked a couple of steps back again, up and down heel-path; then he went on the northern boat again; he picked something up; I can't tell whether it was an ax or a hatchet, and he struck McCarty on the back part of his head, so (explaining manner), with the ax or hatchet; McCarty stood with his back to him (Wilson); he struck him with great force; as he struck, McCarty fell overboard into the canal and water; then Wilson took a pole and put it into the water, and seemed to have liked to have got him out; when he could not get him out he halloed, "here's your man fell overboard;" Wilson stood still there as long as I saw him; McCarty was about 25 or 26 years old, I should think; I stood on the heel-path when I saw Wilson do this; I was fifteen or twenty feet from Wilson when he struck; I could hear the blow; think McCarty did not see Wilson come on the boat, nor behind him, and had no words or altercation with Wilson, the prisoner.

The same witness, upon *cross-examination*, testified: I was then about five feet from the edge of the canal, and fifteen or twenty feet from the place where Wilson struck McCarty; as Wilson came on to the heel-path, he could have seen my face and I his; he and McCarty had no words at that time, as I heard; I was afraid if I went there I would be knocked in too; I went away with driver, with team; I then said to Kiley, "Wilson knocked him off, and he'd be drowned, it was too

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bad," one of them said, "Say nothing about it, he'll be hanged if you do;" I am sure the weapon was an ax or hatchet; I think it was about three feet long, two or three inches wide; Wilson picked it up on the boat; I heard Wilson step on the boat, going up to McCarty; he stepped quick, walked as fast as he could; when he had struck, he dropped the weapon on the boat and took the pole; I remained there till men got there; I went away right off, before they had begun to search; McCarty stood on the boat next to the dock, at the stern; boat lay along the dock; McCarty fell between the two boats; saw his hat float.

Re-examined by People: I am a Dutchman, or German; I am twenty-five years old; seven years in this country.

John P. Wilbeck testified; I am a physician and surgeon; reside at West Troy, town of Watervliet, Albany county, and am one of the coroners of this county; I saw the body of Patrick McCarty on the morning of October 20th, 1858, in the water of the canal, just above the weigh lock at West Troy; he was dead; tied to the dock; I had him taken out of the water; I found a cut on one side of the back part of the head (the right side), externally bruised and torn; the skull, about one and half inches in length, and three-quarters of an inch in width, was driven in just the thickness of the bone, so that the bone was pressed in; the bone was not detached; only one blow was given; such a blow would cause a man to become insensible; would produce concussion of the brain; he was thereby, in my opinion, rendered insensible, so that he could not help himself, and he drowned in the water in the canal; the effect of such a blow itself might be death, not instantly.

The District Attorney here put to the witness the following question:

From your examination of the wound you have described, what kind of an instrument was it caused by, in your opinion?

Question objected to by prisoner's counsel, as not being the subject matter of an opinion. Objection overruled by the court, and prisoner's counsel excepted.

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A. That wound, in my opinion, was caused by a blow from some blunt instrument.

The same witness, upon *cross-examination*, testified : Such an injury could be produced by a fall from a great distance, on just such an instrument as would produce it by a blow ; I know nothing from which to come to the conclusion in this case, that the wound was produced by a fall ; in a majority of cases of such wounds on the skull as this, by good medical treatment the patients do recover.

Le Roy McLean testified : I am a physician and surgeon at West Troy ; I assisted at the *post-mortem* examination of McCarty ; examined his head ; heard Dr. Witbeck's testimony ; I found an incision wound upon the head one and a half or two inches in length ; a portion of the skull was driven in ; I suppose he was rendered senseless by the blow, and then drowned.

Q. From your examination of the wound which you have described, what, in your opinion, was the wound caused by ?

Objected to as above ; overruled ; exception taken.

A. I think it was caused by some blunt instrument, like the head of an ax or hammer.

The same witness, upon *cross-examination*, testified : The membrane inside was not ruptured ; the blow would not produce death immediately ; under proper treatment, a fracture of the kind might present a fair case to recover ; persons do frequently recover from such a wound.

William Edgerly, testified : I live in Moriah, Essex county ; I know prisoner ; saw him in jail in November last ; can't tell exact time ; had a little conversation with him.

The prisoner's counsel here desired to know what the District Attorney intended to prove by this witness.

The District Attorney here offered to show that the prisoner stated to the witness at that time, in substance or effect, that all he could do was to get the Dutchman out of the way ; that the Dutchman had not given bail for his appearance.

Objected to by prisoner's counsel as irrelevant, immaterial and improper. Objection overruled, and excepted to by prisoner's counsel.

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The witness then testified : I told him I was sorry to see him locked up, and I should like to help him if I could ; said he did not know as I could help him any ; he said all I could do was to get the Dutchman out of the way ; he said the Dutchman had not given bail for his appearance at court ; I was subpoenaed to come here.

The prisoner's counsel here moved to strike out the testimony objected to, on same grounds as he objected. Motion refused, and prisoner excepted to refusal.

Daniel McCormick testified : I live at Ticonderoga ; I am acquainted with the prisoner ; saw him in jail in November, the time spoken of by the last witness ; went with Edgerly and heard the conversation ; it was as given by him (Edgerly).

The same objection here taken as with last witness, by the prisoner's counsel. Overruled, and exception taken.

Marietta Doty testified : I was on board the boat of Captain Potter last fall ; I recollect the time of the occurrence ; was on the boat the day before ; this hatchet was then on board.

The same witness, upon *cross-examination*, testified : The boat was named "P. M. Baker ;" about 6 A. M. Armenia was ahead, and Baker at the dock ; this hatchet was sometimes lying on top of the boat, sometimes in the cabin ; that night this was by the water barrel near the cabin door, at the stern of the boat ; it lay there all the day before ; McCarty used to work with in the afternoon of the day before ; next morning I saw it on the deck load of the boat, right hand side, four feet from the cabin door.

The prosecution here rested.

After some evidence had been given on the part of the defence, and counsel on both sides had addressed the jury, the judge charged the jury.

The presiding judge, among other things, stated to the jury that it was not claimed by the prisoner's counsel that the defendant could be convicted of either manslaughter in the first or second degrees, but that if he was guilty of any crime, it was either murder, or manslaughter in the third degree ; and

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Mr. Kimball inquired of Judge Gould whether there could be an appeal from this decision.

Judge Gould replied that he did not understand that there could be.

Mr. Kimball then remarked that the prisoner's counsel had prepared a bill of exceptions, which had not been served, as yet.

Judge Gould responded, that the sentence being pronounced would not prejudice the interests of the prisoner in that respect, and proceeded to pronounce the following sentence :

Judge Gould—"Wilson, have you anything to say why the sentence of the law should not be pronounced against you?"

Wilson—"All I have to say is, that I have been convicted by perjured witnesses. I am a stranger in this city, and have no friends to help me. I am sure I am innocent of the charge. This is all I have to say."

Judge Gould—"I am sorry to say the statement you make is hardly reconcilable with the proof in this case. According to the evidence, the court is perfectly satisfied that the case was one in which the jury could not help rendering the verdict they did. Certain circumstances, proved by all the witnesses, show that you were found in a position where you must have been the only person that could inflict the injury. That he was killed by some one, there is not a reasonable shadow of doubt. That you were the only person in the position to have committed the deed, there is no doubt. Immediately after the act had been committed, you stated that the man had fallen overboard and drowned. You stated what was not true. This fact, and the evidence in the case, together with the finding of the dead body, will lead any intelligent mind to the irresistible conclusion that you did the deed. The testimony of the witness who saw you strike the blow is unimpeached. You knew all about him, and had the opportunity to have impeached his evidence, if you could have done so. That witness swears positively that he saw you strike the blow, and I cannot see how the jury could have come to a different conclusion. The verdict fully satisfies the court. Your statement is altogether

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incomprehensible. Witnesses stood by you during the commission of the terrible act. A hundred of these acts are repeatedly happening all around us in this community; and during the session of this very court, another most terrible crime has been perpetrated in this county. As long as pardons shall be granted, to prevent the due execution of the penalty of crime, we shall be subjected to such events. The only way to make community safe, and to preserve human life, is to have it understood that the penalty of the law will be enforced.

"Your motive we do not know. That is between you and your own conscience. The law is not obliged to find a motive when there is a fact established.

"It becomes you, in your awful position, to consider that your fate is sealed. Your death is determined. I can see no reason to suppose there should be any sort of interposition in your behalf, and that should be the light in which you should view it. You should understand that the period of your life is fixed, and allow no hopes to keep you from preparing for the life to come. You gave no opportunity to your victim to prepare for death. To you the law is more merciful. Your future destiny rests between you and your God, and it now remains with you to make your peace with him.

"The sentence of the court is, that you be remanded to jail, and there confined until the 27th of April next, and on that day, between the hours of 10 o'clock in the morning and 2 o'clock in the afternoon, you be hung by the neck until you be dead! And may God in his infinite wisdom, grant to your soul the blessings he only can give."

A writ of error having been afterwards allowed by Mr. Justice Harris with a stay of proceedings, the cause was removed into this court by writ of error.

Henry Smith, for the prisoner.

I. The judge erred in each of the first three propositions in the charge, to which exceptions were taken.

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1. The language employed entirely ignores the true criterion of the crime of murder, *the intent to kill*. The effect of the language is, that if one push another from the dock, no matter whether unintentionally or with the most innocent and harmless purpose, and he is drowned, it is murder, unless the defendant can prove that he *did not* intend to take life.

2. No such inference could arise against the prisoner, unless the drowning was such a natural consequence of the pushing as would warrant the conclusion that the prisoner knew what would be the result of his act. (*The People v. Hammill*, 2 Park. Cr. R., 227; *The People v. Rector*, 19 Wend., 591.)

8. The charge proceeds upon the idea that the homicide is *per se* criminal, that if the destruction of McCarty's life resulted from the act of the prisoner, it is murder, unless explained, &c. This ruling shifted the burden of proof, and relieved the prosecution from the necessity of convincing the jury, *beyond a reasonable doubt*, of the intent to take life, the existence of which was just as necessary for the prosecution to establish, and which is as much of the essence of the crime as the killing. (*The People v. McCann*, 16 N. Y. R., 66; *Com. v. Hawkins*, 3 Gray, 463.)

4. The purport of the whole charge was that the jury need only determine, in order to find the verdict they did, that the prisoner pushed McCarty into the canal, and that he drowned, which cannot be correct, unless it is true that *every killing*, not explained by the defendant, is *per se* murder.

II. The judge erred in charging, as to manslaughter, that the "heat of passion" means a quarrel, an altercation, *in which the party killed is immediately concerned*.

If there actually exists that "heat of passion" contemplated by the statute, it is absurd to say that it does not palliate the offence, if the accused should, while thus excited, kill some other than the one engaged in the altercation with him. (3 Jacob, L. D., 329, and cases cited; *Whar. Am. Cr. Law*, 36, 37.)

III. The court also erred in charging, upon the same subject, "that the heat of passion must not all be on one side."

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The test the statute makes, is as to the "heat of passion" of the *accused*. Since *he* may be as severely injured, and his passions as much excited by the acts of one who is entirely cool and deliberate, there can be no reason for a rule that deprives the accused of the right of urging that he is only guilty of manslaughter, merely because his adversary was *not* in a heat of passion. (*Whar. Am. Cr. L.*, 370.)

IV. The judge erred in charging, "It is questionable whether words even of the most aggravated character would be allowed in law to produce the 'heat of passion' meant by the statute, which would reduce the grade of the offence."

This rule would entirely ignore the statute as to manslaughter, for if the accused must show a combat under sufficient provocation, then he makes out a case of excusable homicide.

V. The court erred in allowing the witnesses Witbeck and McLean to be asked what instrument, in their opinion, the wound was caused by.

1. The question assumed that the wound was caused by *an instrument*.

2. As it is manifest that a great variety of weapons would produce such an injury as was found on deceased's head, the question did not call for the opinion of the witness as an expert, but merely to make a guess.

S. G. Courtney (District Attorney), for the People.

I. The court properly admitted the evidence of Doctor Witbeck and McLean. The indictment contains various counts, in which the killing is respectively charged to have been done with an ax, hatchet or bar of iron, and by such striking and casting the deceased into the water, the deceased was drowned.

It was proper to show by scientific men (especially, as in this case, by those who made the *post-mortem* examination), the instrument in their opinion used, because,

1st. The kind of instrument used was a material element in showing malice aforethought.

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2d. And because it was part of the defence that the deceased received the injury in falling against the boat, as he was precipitated into the water.

This kind of evidence is always admitted. (*State v. Smith*, 32 *Maine R.*, 369; *Lush v. McDaniel*, 14 *Ired.*, 500; *Com. v. Rogers*, 7 *Met.*, 485; *Jones v. White*, 11 *Humph.*, 268; *Burnett's Com. L.*, 458; *People v. Sullivan*, 3 *Seld.*, 398; *Lake v. People*, 1 *Park. Cr. R.*; *People v. Clark*, 3 *Seld.*, 391; *Phil. on Ev.*, last ed. by *Edw.*, vol. 2, p. 778, &c.)

3d. Even were the rulings of the court unsustained by precedents, this kind of evidence, under the circumstances attending the trial, was properly admitted for the information of the jury.

The prosecution offered in evidence the skull of the deceased on which the wound inflicted, so that the jury might inspect it, which offer was objected to by the prisoner's counsel, on the ground that it was immaterial, and might tend to prejudice the defendant. The court sustained the objection, and afterwards admitted evidence of experts—the surgeons and physicians who made the *post-mortem* examination.

II. The only exceptions remaining are those taken to the charge of the presiding judge.

The parts excepted to were given in illustrating the distinction between the different degrees of homicide. In the illustrations given there was no error; but they were made in conformity with the defined and well settled principles on the subject. The court had expressly defined to the jury the legal meaning of *murder*, and in connection therewith stated the illustrations.

The essence of the crime of murder is *the intent to kill*. Can there be any doubt but that the supposed case could be one of *murder*, unless the circumstances or evidence explained away the intent to kill—*i. e.*, *the crime of murder*.

"The rule of law is, that a man shall be taken to *intend* that which he does, or which is the immediate or necessary consequences of his act." (1 *Russ. on Cr.*, 483; *Com. v. York*, 9 *Met.*, 93, and cases there cited; *Com. v. Rogers*, 7 *Met.*, 500.)

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III. No words or gestures, however false or malicious, provoking or insulting, aggravated with the most provoking circumstances, will free the party killing from the guilt of murder. (1 *Hawk. P. C.*, 98, § 33; *Beauchamp v. State*, 6 *Black. [Ia.]*, 299; *State v. Barfield*, 8 *Ired.*, 344; *State v. Scott*, 4 *Ired.*, 409; *Lord Morley's case*, *J. Kel.*, 53, 55, 65; *State v. Merrill*, 2 *Deveraux*, 269; *Com. v. York*, 9 *Met.*, 93; 1 *Russ. on Cr.*, 514, and cases there cited; *U. S. v. Willberger*, 3 *Wash. C. C.*, 515; *State v. Hill*, 4 *Dev. & Dat.*, 491, 497.)

IV. Malice in murder, is malice aforethought. There is no particular time during which it is necessary the prisoner should have contemplated the homicide. If the intent to kill, or to do other great bodily harm, is executed the instant it springs in the mind, the offence is as truly murder as if it had dwelt there for a longer period. *People v. Clark*, 3 *Seld.*, 385; *Meecham v. State*, 11 *Geo.*, 615; *Green v. State*, 13 *Mo.*, 382; *U. S. v. Cornell*, 2 *Mason*, 60, 91; 1 *Russ. on Cr.*, 483, &c.)

V. Whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be holden for murder or manslaughter, though the person beaten would have died from other causes, or would not have died from this one, had not others operated with it, provided the blow contributed mediately or immediately to the death, as it actually took place in a degree sufficient for the law's notice. (*Bishop Cr. L.*, vol. 2, §§ 653, 595; *Greenl. Ev.*, vol. 3.)

VI. The heat of passion, as explained by the presiding judge, was correctly stated, and the general rule is this: Words added to an assault upon the prisoner, may perhaps suffice, when the assault would not alone, and that if the parties become excited by words, and one of them, acting under the excitement provoked by words, attempt to chastise the other with a weapon not deadly, he may be held for manslaughter, though unfortunately death not intended is inflicted. (*Greenl. Ev.*, § 124; *Reg. v. Sherwood*, 1 *Car. & K.*, 536; *Bishop Cr. L.*, vol. 2, § 636.)

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VII. The intentional killing of a human being, without provocation, and not in a sudden combat, is *murder*, although done in the heat of passion. (*People v. Sullivan*, 3 *Seld.*, 396.)

VIII. In the case at bar there is nothing showing legal provocation, mutual combat or heat of passion. All these elements tending to reduce the grade of the offence are wanting, and the facts in the case all warrant the verdict.

IX. The jury having found that the intention to take life existed at the time the prisoner struck the blow, the only question before the court is, did that intention, existing at the instant of striking the blow, form such a premeditated design as contemplated within the meaning of the statute. (*People v. Clark*, 3 *Seld.*, 385.)

X. A verdict will not be set aside on a bill of exceptions, although there was error in the trial, if the error was such *that it could do no legal injury*, and the rule in this respect is the same in criminal as in civil cases. And the rule is applied in a capital case, where there was an error in the charge to the jury respecting the law of homicide, when the facts of the case do not call for a charge on the point. (*Shorter v. The People*, 2 *Comst.*, 193.)

WRIGHT, J. The death of McCarty was caused by drowning. It was the indirect result of the act of the prisoner Wilson. The blow inflicted would not have produced death, but it caused temporary insensibility, and when McCarty fell, or was knocked into the canal by its force, he was unable to help himself, and was drowned. The questions on the trial were: 1st. Was Wilson guilty of any offence; and 2d. If so, was it murder or manslaughter in one of the degrees defined by statute? These were questions for the jury, under proper instructions from the court.

It appears from the bill of exceptions, that the presiding judge prefaced his charge to the jury by the statement that it was not claimed by the prisoner's counsel that the defendant could be convicted either of manslaughter in the first or second

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degrees, but that if he was guilty of any crime, it was either murder, or manslaughter in the third degree.

It is undoubtedly true, that there was nothing in the circumstances under which the death was effected, to bring the case within the statute definitions of manslaughter in the first or second degrees, unless it be assumed that the sixth section of the statute defining manslaughter in the first degree, is applicable to a case where a party causing death without design, is engaged in an assault and battery. Some judges have taken this position, whilst others have held that, in order to bring a case within the definition of manslaughter in the first degree, it is necessary to show that the accused was committing, or attempting to commit, some other offence than that of intentional violence upon the person killed. (*Darry v. The People*, 2 *Park. Cr. R.*, 634; *The People v. Buller*, 3 *Id.*, 377; *The People v. Rector*, 19 *Wend.*, 605.) But was the proposition that, if the prisoner was guilty of any crime, it was either murder or manslaughter in the third degree, strictly correct? Of this I entertain serious doubt. The statute defines what shall be murder, and also four degrees of manslaughter. It also declares what shall be justifiable or excusable homicide. Manslaughter in the third degree is the killing of another in the heat of passion, without the design to effect death, by a dangerous weapon, in any case except such wherein the killing is declared to be justifiable or excusable.

In the fourth degree, it is defined to be the involuntary killing of another by any weapon, or by means neither cruel nor unusual, in the heat of passion, in any other cases than such as are declared by the statute to be excusable homicide. After defining murder, justifiable and excusable homicide, and the four degrees of manslaughter, it is provided that "every other killing of a human being, by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder, or in this title manslaughter of some other degree, shall be deemed manslaughter in the fourth degree. (2 *R. S.*, 662, § 19.)

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Now this was not a case of murder, unless the killing was perpetrated from a premeditated design to effect the death of McCarty. It was not a case of manslaughter in the first or second degrees. Nor was it manslaughter in the third degree, unless the killing was in the heat of passion, and without a design to effect death, and by a dangerous weapon. For the case to have fallen within this degree, it was not enough that the killing was in the heat of passion, and without the design to effect death, but it must also have been by a dangerous weapon. If the killing was not effected by the use of a dangerous weapon, though the heat of passion existed, and there was the absence of design to effect death, it would not be manslaughter in the third degree. But if the killing was in the heat of passion, and without the design to effect death, but not by the use of a dangerous weapon, I see not why a conviction might not properly be had of manslaughter in the fourth degree; and if so, the instruction that Wilson, if guilty of any crime, it was either murder or manslaughter in the third degree, was erroneous. I use the term *instruction*, for what the judge said to the jury was in the nature of an instruction, whilst directing their attention to the statutory definitions of murder and manslaughter in the different degrees, and interpreting those provisions. But the prisoner's counsel appear to have been satisfied with this branch of the charge, and took no exception.

It is now well settled that, under our statutes, to constitute the offence of murder, there must be a premeditated design to effect the death of the person killed, or, in other words, an intention to kill. The design may be long meditated, or it may be conceived at the moment the fatal blow is given; but it must be found to exist, else it is not murder. There must be, what the common law did not require, the existence of an actual intention to kill. In this case, unless Wilson, when he pushed or knocked McCarty overboard from the canal boat, precipitating him into the water, formed the design, at the instant, to kill the latter, it was not murder. Such intention may be inferred from the circumstances under which the violence is inflicted, and sometimes from the act itself, for men are

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to be presumed to intend the natural and inevitable consequences of the acts which they willfully perform; but unless there be such an *intention*, the act cannot be more than manslaughter. The effect of our statute is to explode the whole common law doctrine of implied malice and the power of recent provocation, to reduce the act from murder to manslaughter. In the absence of the intent to kill, the act must be justifiable or excusable homicide or manslaughter, within some one of the degrees defined by statute. Was the judge therefore correct, whilst speaking of the blow inflicted by Wilson, in instructing the jury that, if the natural consequences of a blow is to precipitate a man into the water, and he drown, such act is murder, unless explained away by evidence or circumstances attending the transaction? Or was he correct in the charge, "That should a man stand on the edge of a dock, and another push him into the river, the pusher is not entitled to say to the other, you must swim; if he be drowned, such act is murder, unless explained away by evidence of the circumstances attending the transaction, for the law presumes that a man intends the consequences of his acts, unless otherwise explained?" Either of the cases put to the jury would, at common law, have been *prima facie* murder, for malice would have been implied from the act itself, and the burden of proof to explain or reduce the grade of the offence to manslaughter would have been shifted upon the accused. But under our statutes, another ingredient was wanting to constitute the crime of murder, viz.: an actual intention, by the infliction of the blow, or the push into the water, to kill. It is true that the jury would be at liberty to infer this intention in a proper case from the act itself, upon the salutary rule of the common law, that a man is held to intend that which, in the ordinary course of things, would be the natural result of his acts, but no legal implication of a felonious intention can now arise, so as to throw upon the accused the burden of explaining the innocence of the transaction, or reducing the offence to manslaughter. It seems apparent to me that the learned judge had in view the common law rule, that in every homicide by vio-

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• lence, the law implies malice, so as to make it *prima facie*
• criminal, throwing the *onus* of explanation on the accused;
• else what is meant by the language, "Unless explained away
by evidence or circumstances attending the transaction?" "If,"
says the judge, "the natural consequences of a blow is to pre-
• cipitate the man into the water, and he drown, it is murder,
unless explained away by evidence," &c. How explained
away, and by whom? Certainly, by the prisoner. "To strike
a blow, the natural consequence of which is to precipitate
another into the water, and that other drown, it is murder."
This is the instruction. Why, unless it be that the law im-
plies malice, and an actual intention to kill need not exist. It
is virtually saying that it is not incumbent upon the prosecu-
tion to satisfy the jury of a conceived design to effect death by
the person inflicting the blow, before there can be a conviction
for murder; but that the act of inflicting a blow under circum-
stances that will necessarily precipitate the person into the
water, and he drown, is sufficient *prima facie* (the law inferring
that the act was malicious), to establish guilt. It seems to me,
that, taking the charge together, it proceeded upon the idea
that the homicide was *per se* criminal, and that if the destruc-
tion of McCarty's life resulted from the act of the prisoner, it
• was murder, unless explained away by proof on the part of
the prisoner. This ruling shifted the burden of proof, and
• relieved the prosecution from the necessity of satisfying the
• jury of the intent to take life, the existence of which fact it
was just as necessary for the prosecution to establish, and
which was as much of the essence of the crime, as the killing.
Should it be said that the illustrations given of what would be
• murder, were not applicable to the facts of the case, and are
therefore to be treated as mere abstract propositions, it is not
difficult to perceive that they were calculated to mislead the
jury. The circumstances under which McCarty was drowned
• were few and simple. He and Wilson were hands on board
• of boats navigating the canals of the State. McCarty's boat,
with two others, were lying in the canal, near the railroad
bridge, at West Troy. About 3 o'clock in the morning, the

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boat on which Wilson was employed arrived from Buffalo, and came too along side of one of the boats. Whilst they were engaged in securing and managing her lines, an altercation arose between Wilson and McCarty. Whether they had ever met before does not appear, but abusive words passed between them, and threats of fighting. McCarty was near the stern or side of his boat, when Wilson stepped upon her deck. As the latter approached McCarty, he picked up from the deck a blunt instrument and inflicted a blow with it upon the head of McCarty. The latter was so near the side of his boat that, being stunned by the blow, he fell into the water of the canal, or the force of the blow precipitated him into the water. Wilson dropped the weapon on the boat, and took a pole and attempted to get the body out of the water, but failing, called to the men of the other boats. The blow producing a concussion of the brain, rendering him insensible, McCarty could do nothing to extricate himself from the water, and he drowned.

Now, that the destruction of the life of McCarty resulted from the act of Wilson was manifest, but certain it is that it was not murder, unless at the time of striking the blow he designed to kill him. This was a controlling question in the case in characterizing the act as murder, and it was a fact that the jury must find before a conviction could legally be had. Indeed, in my view, it was the principal question. The jury might have found the actual intention to kill, from the circumstances attending the act, or inferred it from the act itself, if a murderous weapon was used, or the blow was inflicted in a dangerous place, or the natural and inevitable consequences of such blow was to produce insensibility, and from McCarty's position on the boat to precipitate him into the water in that state. But instead of saying to the jury that they must find the actual intention to kill at the time of inflicting the blow which precipitated McCarty into the water, before they could convict of murder. I cannot but think that the charge of the judge was calculated to mislead them, if nothing more, by the abstract propositions (if they are to be so called), enunciated in this part of it. But the judge did not intend them as abstract

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propositions. He was speaking of the case in hand when he told the jury that pushing a man into the water, if he were standing on the edge of a dock, or that if the natural consequences of a blow be to precipitate the man struck into the water, and he drown, the acts were murder. The jury must naturally have understood from the charge, that in order to find the verdict that they did, they need only determine that the prisoner pushed or knocked McCarty into the water, and that he drowned. This would be ignoring the true criterion of the crime of murder, *the intent to kill*, and cannot be correct unless it is true that every killing, not explained by the defendant, is *per se* murder.

In the judge's explanation to the jury of the statutory offence of manslaughter in the third degree, he stated "that the 'heat of passion' means a quarrel—an altercation in which the party killed is immediately concerned; that is, the 'heat of passion' must not be all on one side; there must be sufficient cause for it." And again, after the jury had returned into court, and inquired whether they could find a verdict in any other form than guilty or not guilty, the presiding judge further charged, among other things, in these words: "It is questionable whether words even of the most aggravated character would be allowed to produce the heat of passion meant by the statute, which would reduce the grade of the offence."

- The idea sought by the judge to be conveyed to the jury in his explanation of the term "heat of passion," in his first charge, probably was, that if in a paroxysm of unprovoked anger one kill another, or instigated by brutal passion, not excited by such other, the assailant kills his victim, it is not that "heat of passion" which forms one of the statutory elements of manslaughter. As a principle, this was undoubtedly correct. If the intention to kill exists, it is not the less murder that the killing occurred under the excitement of unprovoked and brutal passion. I cannot but think, however, that the judge was unfortunate in the use of terms to convey the idea to the jury. Is it always necessary to the existence of that "heat of passion" contemplated by the statute, that there

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should be a quarrel or altercation in which the party killed is immediately concerned? I think not. If the contemplated "heat of passion" actually exists, it would palliate the offence, if the accused should, whilst thus excited, kill some other than the one engaged in the altercation with him. Again, said the judge, "the heat of passion must not be all on one side; there must be sufficient cause for it." Now, would not the jury from this probably understand that the statute "heat of passion" could not exist where there was no manifestation of excitement or passion on the side of the party assailed? Such a view would certainly be a mistaken one. The test which the statute makes, is as to the "heat of passion" of the accused. He may be severely injured, and his passions excited by the *acts* of one who is entirely cool and deliberate. Again, what was meant by the expression, "There must be sufficient cause for 'the heat of passion?'" Or, rather, what would the jury probably understand by it? Why, that there must be sufficient in the conduct of the party assailed to provoke and heat the passions of the assailant. What conduct would be sufficient, was not explained. Whether an assault, or words alone, or words added to an assault. Subsequently, however, the judge instructed the jury substantially, that the use of words alone, even of the most aggravated character, would not be allowed in law to produce the heat of passion meant by the statute, which would reduce the grade of the offence; that is, that an excited or heated passion, provoked by words alone, even of the most aggravated character, is not that "heat of passion" meant by the statute in defining the offence of manslaughter. This was virtually saying to the jury that in no case where a party, acting under an excitement provoked by words alone, assaults another, and death, not intended, is the result of the assault, can the offence be reduced to manslaughter. In the prisoner's case there was no pretence that in making the assault upon McCarty he was acting under any other excitement than that provoked by words; and this declaration of the law was equivalent to saying to the jury that they could not find the prisoner guilty of manslaughter in the third degree, even

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though the killing was by a dangerous weapon, and unintentional. Was the law, therefore, in this respect correctly expounded? I think not. The law, respecting the infirmities of our nature, attaches a less degree of criminality to acts of violence perpetrated under an excitement provoked by the assailed. The passions may be heated as effectually by words as by acts; and an assault may be provoked oftentimes as readily by the former as the latter. In cases of assault of the person, it has always been held that provocation by words has gone far to mitigate the legal wrong. It cannot be that the accused must always show a combat and a sufficient provocation. It is enough that the passions are heated by the acts or conduct of the one upon whom the assault is made, and it matters not whether this state is produced by acts or words, if either the one or the other are naturally calculated to produce it. It is conceded, in the points of the counsel for the People (what is undoubtedly the law), that if parties become excited by words, and one of them, acting under the excitement provoked by words, attempt to chastise the other with a weapon not deadly, he may be held for manslaughter, though death, not intended, is inflicted. This could not be, if the law would not allow, as the judge charged, "the heat of passion" meant by the statute to be produced or provoked by "words even of the most aggravated character."

Upon the trial, the coroner, who was a physician, and who had held the inquest and made the *post-mortem* examination, was called as a witness. He described with particularity the wound discovered on the right side of the head of McCarty, and expressed the opinion that only one blow was given, and that blow produced concussion of the brain, causing insensibility. He expressed the further opinion that McCarty was by the blow rendered insensible so that he could not help himself, and he drowned in the water of the canal. The prosecution then put to him the following question: From your examination of the wound that you have described, what kind of an instrument was it caused by, in your opinion? This question was objected to as not being the subject matter

SUPREME COURT. At Chambers. New York, November, 1859.
Before *Ingraham*, Justice.

THE PEOPLE *v.* JOHN RICHARDSON.

On return to a writ of *habeas corpus*, issued to inquire into the cause of detention, after commitment by a magistrate, and before indictment, additional proof may be received by the judge for the purpose of enabling him to decide upon the legality of the detention.

THIS matter came before Mr. Justice *Ingraham*, at Chambers, on a writ of *habeas corpus*, and the question was, whether additional evidence could be received to show that the prisoner was legally detained. The prisoner had been committed by a magistrate, but had not been indicted. The following opinion was given:

INGRAHAM, J. The affidavits made before the police justice show that the prisoner proposed to Little to retain the money of his employer, which he was sent to obtain from the bank. Knowing the money to be the property of Winslow, Lanier & Co., he took the money from Little and concealed it. It is not by any means clear that, on this evidence, the prisoner could not be convicted of grand larceny. The money was the property of the firm, although in the possession of their servant, and, if taken from the servant, without his consent, it would clearly have been a larceny. The assent of the servant would not alter the nature of the offence.

But if it amounts to nothing more than an embezzlement, the evidence is ample to sustain the charge against the prisoner of receiving the property of another, knowing it to have been embezzled, and the only ground on which the discharge of the prisoner is sought is, that the clerk was under eighteen years of age when the embezzlement was committed. If this be true, the crime of embezzlement could not be charged upon Little, and the prisoner would not, of course, be liable under that charge. The District Attorney now offers additional

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proof to show that Little is mistaken as to his age, and that he is over nineteen years of age. I think that such evidence may be taken now.

The 58th section of the *habeas corpus* act provides, "that if the prisoner appear to have been legally committed for the offence, or if he appear, by the testimony offered *with the return* or *on the hearing*, to be guilty, the court should remand him," &c. This contemplates an examination of the evidence returned by the magistrate, or of evidence offered on the hearing, and allows such evidence then to be received.

Besides this, although I should discharge him on this writ, if the District Attorney has the necessary evidence, he could at once apply for a new commitment on such proof, and it would be my duty to commit him anew thereon.

It would not be a creditable administration of justice to discharge a prisoner from custody on such a technical objection, when the District Attorney offers to supply the defect in the evidence, and produce sufficient testimony fully to establish the guilt of the prisoner.

The evidence may be received, and on producing proof that the correct age of Little is over eighteen years, the prisoner must be remanded.

SUPREME COURT. New York General Term, February 1860. *Sutherland, Allen and Bonney*, Justices.

THE PEOPLE v. RICHARD BARRY.

An order quashing a conviction and sentence, is not reviewable on writ of error under the act of 22d March, 1852. That act is only applicable to judgments.

THIS was a writ of error on behalf of the People to the New York General Sessions.

The prisoner was indicted on the 21st of May, 1858, for an assault upon Philip Wolfe, with intent to kill. On the same

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day another indictment was presented against him for a robbery, by violence, in stealing over \$100 from the person of Philip Wolfe. To the first indictment the prisoner pleaded guilty of an assault and battery, and was sentenced to four months' imprisonment, on the 23d of October, 1858. On the 5th of November, 1858, a notice was given of a motion for a new trial, and on the 15th of November, 1859, an order was made in the Sessions, by the city judge, that the conviction and sentence upon conviction be quashed, and that the order of imprisonment be revoked, "said indictment having been, on the same day, by operation of the statute, superseded and quashed by the filing of another indictment for the same matter, although charged as a robbery."

N. J. Waterbury (District Attorney), for the appellants.

I. The section of the act referred to (3 *R. S.*, 5th ed., 1018, *marg. p.* 726, § 42), reads: "If there be at the time pending against the same defendant two indictments for the same offence, or two indictments for the same matter, though charged as different offences, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed." The case involved only elementary principles.

As a matter of practice, the motion to quash cannot be entertained after plea, impanneling of jury, giving of evidence, and conviction; and it is decided that under the last above statute, a motion must be made before such indictment will be quashed.

II. The indictments presented different offences and different matters severally, unless a grand larceny is the felonious assault by one person upon another.

Brown, Hall and Vanderpoel, for the respondent, moved to quash the writ.

By the Court, SUTHERLAND, J. The order of the city judge, on November, 15, 1858, quashing the previous conviction of the defendant, Barry, and his sentence on such conviction, by the Recorder, on October 23, 1858, and revoking and an-

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nulling the Recorder's order of imprisonment, was not a judgment upon the indictment, but was, or purported to be, an order quashing and annulling the previous proceedings before and by the Recorder in this case.

The act of 1852, allowing writs of error to be brought in behalf of the People in certain cases, allows such writs "to review any judgment rendered in favor of any defendant upon any indictment," &c. The order or proceeding of the city judge, of November 15, so far from being a judgment rendered upon the indictment, was an order or proceeding annulling and destroying, or undertaking to annul and destroy, a previous judgment rendered upon the indictment.

Therefore it is clear, however unauthorized or erroneous the order of the city judge, on November 15th, may have been, that such order cannot be reviewed or such error corrected by writ of error under the act of 1852, and that the motion made by defendant to quash the writ of error in this case must be granted.

BONNEY, J. In the Court of Sessions, on the 21st May, 1858, the indictment was found against Richard Barry, for assault and battery with intent to kill. On the same day, at a later hour, an indictment for robbery in the first degree was found against the same person, for the same act or matter for which the first indictment was found. On the 4th October, 1858, Barry was arraigned on the indictment first found, and then pleaded guilty of an assault and battery; and upon that plea was, on 23d October, 1858, sentenced to imprisonment in the penitentiary for the term of four months.

On the 5th November, 1858, a motion was made in Sessions, on the said indictments and other papers, for a new trial, on the ground of irregularity in the proceeding and on the merits, and on the 15th November, 1858, that court ordered that said conviction and sentence be quashed, and the order of imprisonment to the sheriff thereon be revoked and annulled, "for the irregularity of taking the same on the indictment found May 21, 1858, against the said Richard Barry, charging him with

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an assault and battery, with intent to kill one Philip Wolfe, said indictment having been on the same day, by operation of the statute, superseded and quashed by the filing of another indictment for the same matter, although charged as the offence of robbery." This last order of the Sessions is now brought before this court, by writ of error, for review.

The counsel for Barry move to quash the writ of error as unauthorized by law. In the case of *The People v. Corning* (2 Comst., 9), decided in December, 1848, the Court of Appeals dismissed the writ of error, on the ground that a writ of error to that court would not then lie in behalf of the People after judgment for the defendant in a criminal case; and in the opinion in that case, Judge Bronson also expresses the opinion that the writ in behalf of the People would not be from the Sessions to Supreme Court. By the act of 22d March, 1852 (*Laws of 1852*, 76, ch. 82), it is enacted that writs of error to review any judgment rendered in favor of any defendant, upon any indictment for a criminal offence (except after acquittal by a jury), may be brought in behalf of the People, &c., on being allowed by a justice of the Supreme Court. In this case, the judgment of the court below was rendered on the 23d of October, 1858, on conviction by confession, that Barry be imprisoned in the penitentiary four months. Afterwards it was, by the Court of Sessions, on motion, ordered that said conviction and sentence be quashed for irregularity, &c. In my opinion, this order or decision of the Court of Sessions, on motion, was not a judgment rendered upon the indictment, within the meaning and intent of the act of 1852. The motion to quash the writ of error, should consequently be granted.

The order of the Court of Sessions sought to be reviewed, was by that court founded on 2 *Revised Statutes*, 726, section 42, which is in the following words: "If there be, at any time, pending against the same defendant, two indictments for the same offence, or two indictments for the same matter, although charged as different offences, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed."

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In this case two indictments for the same matter, but charged as different offences, were on the same day (21st May, 1858) found against the defendant. Afterwards, on the 4th October, 1858, on being arraigned on the first indictment, which was for the minor offence, by leave of the court and consent of the District Attorney, he pleaded guilty of an offence less than that charged, and on that conviction by confession, sentence was pronounced October 23d, 1858.

The statute is clear and positive, and there can be no question that, on the finding of the second indictment, the defendant was entitled to have the first indictment quashed. But the statute does not say that the first indictment shall, on the finding of the second, become void, so that no trial or conviction thereupon can afterwards be had by confession or otherwise. Some action by the court, on motion, in behalf of the accused, or otherwise, to put that indictment out of the way, was evidently intended, and an order of the court was necessary to quash it.

From the case as it now appears, it is a legitimate conclusion that this defendant preferred a conviction by confession, on the indictment for the minor offence, in its mitigated form, to the hazard of a conviction by the jury, on trial of the indictment for the greater offence, and acted accordingly. In my opinion, it was competent for him to waive the provision of the statute in his favor, and I think he has clearly and advisedly done so; and that after his confession, he had no right to claim the benefit of the statute which he has so waived. The cases of *The People v. Monroe Oyer and Terminer* (20 Wend., 108), is direct authority on this point. If, however, I am right in the conclusion first stated, we have no power to correct the error committed by the court below.

SUPREME COURT. Monroe General Term, March, 1860. *Smith, Johnson and Knox, Justices.*

WILLIAM S. COATS, plaintiff in error, *v.* THE PEOPLE, defendants in error.

Form of a writ of error, sued out by the defendant, to remove a cause, after conviction, from the Court of Sessions to the Supreme Court, with the allowance of the same and stay of proceedings on the sentence.

Form of an indictment against husband and wife for the embezzlement and larceny of property charged to belong to A. C., as Superintendent of the Poor of the county.

An indictment for embezzlement and larceny was found against W. S. C. and M. C., his wife, and, on motion in behalf of M. C., the court quashed the indictment as to her: *Held*, that quashing the indictment as to M. C. did not discharge it, and was no reason for quashing it as to W. S. C., but that he could be tried under the indictment as if originally indicted alone.

It is no reason for quashing an indictment for the embezzlement and larceny of articles of food provided for the support of a county poor house, that they are charged in the indictment as the property of the Superintendent of the Poor of the county.

When the keeper of a county poor house, employed for that purpose by the Superintendent of the Poor of the county, and holding under him, secretly sold and converted to his own use articles of food provided for the support of the county poor house: *Held*, that he was guilty of embezzlement within the statute (2 R. S., 678), and could be convicted of that offence under an indictment charging that the articles embezzled were the property of such Superintendent of the Poor.

Counts for embezzlement and larceny may be joined in the same indictment.

It is no objection to a count for embezzlement, that it charges the embezzling of several different articles, some of them of more, and some of them of less value than \$25 each.

Where, on the cross-examination of a witness, he was asked whether he had not been convicted of petit larceny, and whether he had not been in jail under sentence on a criminal charge, and, on objection made by the opposite counsel, the evidence was excluded as being immaterial, and at a later stage of the trial the witness was recalled, and all objections to the questions were withdrawn, and an opportunity was given for a full examination: *Held*, that no error had been committed which would warrant a reversal of the judgment.

On the trial of an indictment for embezzlement, it is competent to prove by the employer, that he never gave any authority to the defendant to do the acts complained of, and that the defendant has never accounted or reported to him

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for the property charged to have been embezzled; and such evidence may be given before the proving of the secreting or converting to his own use, by the defendant, of the property in question.

It is not competent, on the trial of such an indictment, for the defendant to prove that he reported promptly to his employer another transaction, not connected with the acts complained of, and of a different character.

Though the testimony of an accomplice should be received with great caution, yet a conviction may be had on the uncorroborated testimony of an accomplice, if the jury are fully satisfied of its truth.

It is not error for a court to refuse to charge, in a criminal case, that "proof of previous good character of the accused is a sufficient defence in a doubtful case."

THIS case came into this court on writ of error to the Court of Sessions of Yates county. The writ, with the allowance and stay of proceedings, were as follows:

The People of the State of New York, by the grace of God free and independent, to the County Judge and [I. s.] Justices composing the Court of Sessions in and for the county of Yates, Greeting:

Because, in the record and proceedings, and also in the giving of judgment on a certain bill of indictment which was in our said Court of Sessions before you, against William S. Coats, indicted with Matilda Coats, for the crime of embezzlement, manifest error hath intervened to the great injury of the said William S. Coats, as by his complaint we are informed: We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done in the premises between us and the said William S. Coats, in this behalf, do command you, that if judgment be thereupon given, then you send to our justices of our Supreme Court for the seventh district, distinctly and openly under your seal, the record and proceedings upon the indictment aforesaid, with the bill of exceptions therein, and with all things concerning the same, and this writ, so that they may have them at the Court House in the city of Rochester, on the first Monday of March next, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that

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error, what of right and according to the law and custom of the State of New York ought to be done.

Witness, E. Darwin Smith, one of the Justices of our Supreme Court, at the Court House in the city of Rochester, the 20th day of February, in the year 1860.

DYER D. S. BROWN, *Clerk*.

JOHN L. LEWIS, Jr., *Attorney*.

Indorsed as follows :

I do hereby allow the within writ of error, and do further order and expressly direct that the said writ of error and this allowance thereof do operate as a stay of proceedings on the judgment upon which such writ of error is brought; and the sheriff of the county of Yates is therefore hereby ordered to stay the execution of the sentence pronounced against the said William S. Coats, until the further order of the Supreme Court on this writ of error.

HENRY WELLES.

Dated February 20, 1860

It appeared by the return that an indictment for embezzlement and larceny had been found as follows :

State of New York, Yates County, ss :

The Jurors of the People of the State of New York, and for the body of the county of Yates aforesaid, upon their oath, do present :

That William S. Coats, of the town of Jerusalem, in the county of Yates, and Matilda Coats, wife of the said William S. Coats, of the town of Jerusalem, in the said county of Yates, on the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and fifty-six, at the town of Jerusalem, in the county of Yates, were agents to Adam Clark, as the Superintendent of the Poor of the county of Yates, and keepers of the County Poor House in and for the county of Yates, employed as such by and under the said

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Adam Clark, as such Superintendent as aforesaid, and employed and entrusted as such agents and keepers by the said Adam Clark, as such Superintendent as aforesaid, to receive and take charge for him, the said Adam Clark, as such Superintendent of the Poor of the county of Yates, of goods, chattels and personal property, pork, hams, butter, beef, meat, fowls, wool, knives and forks, crockery, sugar, coffee, cattle and other stock, provisions, groceries, household articles and furniture, wheat and other grain and farm produce, and farm stock. And being then and there such agents and keepers so employed and trusted as aforesaid, the said William S. Coats and the said Matilda Coats, by virtue of such employment and entrustment, did then and there receive and take into their possession, for and on account of the said Adam Clark, as such Superintendent of the Poor of the county of Yates, their said principal and employer, one barrel of lard, of the value of sixty dollars; three hundred pounds of lard of the value of sixty dollars; two half firkins of butter, of the value of twenty-five dollars; eighty chickens, of the value of twelve dollars; thirty ducks, of the value of six dollars; twelve turkeys, of the value of four dollars; one hundred and fifty fowls, of the value of twenty dollars; eighty pounds of butter, of the value of sixteen dollars; one thousand pounds of pork, of the value of one hundred dollars; three hundred and fifty pounds of pork in the hog, of the value of twenty-five dollars; eight hundred and twenty pounds of pork hams, smoked, of the value of eighty two dollars [here followed a list of many more articles which it is unnecessary to repeat], belonging to the said Superintendent of the Poor of the county of Yates; and having so received and taken into their possession the said one barrel of lard, three hundred pounds of lard, two half firkins of butter, eighty chickens, thirty ducks, twelve turkeys, one hundred and fifty fowls, eighty pounds of butter, one thousand pounds of pork, and the said other goods, chattels, personal property and effects aforesaid, for and on account of their said employer and principal, afterwards, to wit: On the day, in the year aforesaid, at the town, in the county aforesaid, they, the said

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William S. Coats and Matilda Coats, then and there, with force and arms, without the assent of the same Adam Clark, as Superintendent, as aforesaid, their said employer and principal, the same goods, chattels, personal property and effects aforesaid, so intrusted to them as aforesaid, did unlawfully, fraudulently and feloniously take, embezzle, carry away and convert to their own use, contrary to the trust and confidence reposed in them, the said William S. Coats and Matilda Coats, by the said Adam Clark, as such Superintendent of the Poor aforesaid, to the great damage of the said Adam Clark, as such Superintendent of the Poor aforesaid, and other people of the county of Yates, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present: That the said William S. Coats and Matilda Coats, on the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and fifty-six, at the town of Jerusalem, in the county of Yates, with force and arms, one barrel of lard, of the value of sixty dollars [enumerating the same articles as in the first count], the goods, chattels and personal property of Adam Clark, as Superintendent of the Poor of the county of Yates, then and there being found, then and there feloniously and unlawfully did steal, take and carry away, contrary to the form of the statute in such case made and provided, to the great damage of the said Superintendent of the Poor of the county of Yates, and the people of the county of Yates, and against the peace of the People of the State of New York, and their dignity.

H. M. STEWART, *District Attorney.*

Indorsed, A true bill.

JEREMIAH S. BURTCH, *Foreman.*

William S. Coats pleaded not guilty. On motion, in behalf of Matilda Coats, the following order was entered:

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YATES SESSIONS.

The People	}
v.	
William S. Coats and	
Matilda Coats.	

May 18, 1857. Indicted jointly for grand larceny and embezzlement.

Henry M. Stewart, District Attorney.

D. J. Sunderlin, Attorney for defendant.

"MOTION TO QUASH THE INDICTMENT AS AGAINST MATILDA
"COATS.

"After hearing D. J. Sunderlin and others, of counsel for defendant, Matilda Coats, in favor of, and Henry M. Stewart, District Attorney, in opposition thereto, it is ordered that the indictment in this cause be and the same is hereby quashed as to the defendant Matilda Coats."

The cause then proceeded to trial as against William S. Coats, and after the impanneling of the jury, the prisoner's counsel moved the court to quash the indictment, on the following grounds:

1. That it appears by the record that the indictment had been quashed as to Matilda Coats; and that the defendant and the said Matilda Coats, having been jointly indicted, quashing it as to one, quashed it as to both, the indictment being an entire thing.
2. That the property charged to have been embezzled and stolen is erroneously charged to be the property of Adam Clark, Superintendent of the Poor of the county of Yates, when it should have been charged as being in the Board of Supervisors of said county.
3. That the count for embezzlement cannot be sustained, because it alleges that the defendant, William S. Coats, was keeper of the county poor house, and therefore was not the

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clerk or servant of any private person, or of any copartnership, or the officer, agent, clerk or servant of any incorporated company; the property alleged to have been embezzled not being charged to be the property of any private person or copartnership, and the Superintendent of the Poor not being an incorporated company; and the count for larceny cannot be sustained, because it alleges that William S. Coats was such keeper, and therefore had lawful possession of the property alleged to be stolen, and could not be guilty of larceny of it; and the indictment failing to charge an offence under the statute, should therefore be quashed.

4. That the office of keeper of the poor house being created by statute, and the superintendent being designated by statute to appoint or employ such keeper, it is only a statute duty, and the relation of principal and agent, master and servant, or clerk, does not exist between them.

5. That the indictment is bad for duplicity and multifariousness in charging different offences of different degrees in the same count and in different counts.

The court denied the motion, to which decision the defendant's counsel excepted.

Upon the trial, the District Attorney introduced *Adam Clark* as a witness, who testified as follows:

I was sole Superintendent of the Poor of Yates county from January 1st, 1856, to January 1st, 1857; I employed the defendant, William S. Coats, as keeper of the poor house in March, 1856; the agreement between us was, that he was to take charge of the poor house and farm, and the paupers that were placed under his care during the year; to furnish all the female hired help during the year; to faithfully perform the duties, and receive \$328 for the year; the year commenced on the first day of April, 1856; he was likewise to use his team on the farm what was necessary.

Q. In what capacity was he employed? A. As keeper of the county poor house and farm; he was to give his whole time and attention to the duties of keeper during the year; I think he was to have the privilege of keeping his team; he

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was to have the board of himself and family at the poor house ; he continued to act as keeper from the first of April, 1856, till the 26th or 27th of December following, which is as far as my knowledge extends ; during that time he resided with his family at the county poor house in the discharge of his duties as keeper ; there were pork hams at the poor house in the spring of 1856 ; I could not state how many ; they were smoked on the premises during the preceding winter and fall ; the defendant had charge of all personal property in the poor house and on the premises during the year.

Q. Were there any provisions on the premises except those that belonged to the county ?

This question was objected to by defendant's counsel, as being irrelevant and immaterial. The court overruled the objection, and decided the question to be proper, to which decision defendant's counsel excepted.

A. I do not recollect of any ; Mrs. Coats had the privilege of fattening a couple of hogs there ; she had also the privilege of keeping a couple of cows, which she claimed ; those hams belonged to the county so far as I know.

Q. Have you at any time given the defendant, William S. Coats, authority to sell any pork hams from the county poor house or premises ? *A.* No further than to sell to the work hands on the place when they wanted provisions ; I never gave any consent that he should convert any of them in any manner to his own use, except for purposes of his own table.

Q. Has the defendant ever accounted to you, or reported to you for and as to any pork hams sold or by him taken away from the poor house, with the exception you have named ?

This question was objected to by defendant's counsel, as irrelevant and improper, because there is no evidence that defendant had sold or taken away any hams from the poor house. The court overruled the objection, and decided the question to be proper, to which decision defendant's counsel then and there excepted.

A. He has not ; he has never informed me in any manner that he has so sold pork hams ; my term of office commenced

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1st January, 1854, and I acted for three years; the first year I had two associates; in 1855 I had one associate, and in 1856 I was alone.

John Daines was then sworn for the People, and testified: In the spring and summer of 1856, I worked at the poor house; William S. Coats and Adam Clark both employed me; I was at work by the month on the poor house farm; I boarded there; my term of work commenced there the first of April, and I worked there till late in the fall; I worked under the direction of defendant; I do not know how many pork hams were cured at the poor house in the winter and spring of 1856; they were smoked in the smoke house; after they were smoked they were carried out of the smoke house into the cellar; I should think there were over one hundred hams and shoulders; a number were removed up into the garret the last of April or first of May; I think I took forty up; they were taken up there by the direction of defendant and his wife; the garret was in the upper part of the main building, up three pair of stairs, called the north garret; I took those hams to Geneva about the first of June with the county team; one of them was a grey horse, and the other a sorrel, with a strip in his forehead; the grey horse had been on the farm three or four years; the sorrel was bought by defendant and Moses W. Eastman, a former superintendent for the county; the wagon was a lightish kind of a lumber wagon, and belonged to the county; I took the hams to Geneva by the direction of defendant and another person; a day or two before I went, defendant told me it was good weather, and he wanted I should go with the hams; he wanted me to start early; this may have been the day before; the time was then fixed for me to go; we loaded them in the neighborhood of midnight; defendant assisted me; they were brought down out of the garret, and put into the wagon at the front door, and we both loaded them when we brought them down; the load consisted of hams, dried beef and tongues, and a half firkin of butter; I do not remember that there were any shoulders; the number of hams was forty; there were about one hundred pounds of dried beef

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and six or seven tongues; there was no mark on the hams; defendant told me to take the hams to Geneva and sell them, and get what I could for them; I do not recollect what he told me to do with the money; he told me to start early; I started in the neighborhood of two o'clock in the morning; I got into Geneva in the neighborhood of nine o'clock in the morning; I sold my load to different persons, but the heft of it I sold to George C. P. Teal; I sold part before I sold to him; but I do not know how many, nor to whom I sold them; Mr. Teal's place of business is on Water street, on the west side, near the depot; James D. Page advised me to go to him; I sold Mr. Teal some hams and dried beef; I sold him the balance of the load; I do not recollect how many pounds of ham there were; I sold to him at nine cents a pound all around, and threw the tongues in; he paid me in the neighborhood of forty-five dollars; I then went to the hotel and fed my horses; I got back to the poor house about sundown; I gave the money I received to Mrs. Coats; defendant and she was in the room together when I went in; took out a paper that I had with the figures on it of the sale; I gave defendant the paper, and I gave Mrs. Coats the money; she said she would be banker, or something like that; I saw Mr. Page at Mr. Teal's when I was selling to him.

On his *cross-examination*, among other things, the witness was asked the following questions:

Q. Have you been convicted of petit larceny since you lived in Jerusalem?

This question was objected to by the District Attorney, on the ground that the highest evidence of such conviction must be produced. The court sustained the objection, and decided the question to be illegal and improper; to which decision the counsel for defendant excepted.

Q. How many times have you been in jail in this county?

This question was objected to by the District Attorney, on the ground that it was immaterial. The court sustained the objection and decided the question to be improper and imma-

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terial, to which decision the counsel for the defendant excepted.

Q. Have you been in jail under sentence on a criminal charge?

This question was objected to by the District Attorney, on the ground that it was immaterial. The court sustained the objection, and decided the question to be immaterial; to which decision the counsel for defendant excepted.

At a later stage of the trial, the counsel for the People re-called this witness, and offered him for further cross-examination by defendant's counsel, and withdrew all objections to the questions put to the witness on his cross-examination, and consented that they might be answered, and the witness fully examined and cross-examined on those points.

James D. Page and *George C. P. Teal* were then called as witnesses for the People, and gave evidence tending to corroborate the testimony of *Daines*, as to his selling the provisions in Geneva at the time testified to by *Daines*.

Adam Clark, recalled for the People, further testified: One of the horses of the county team was a dark grey and the other was a sorrel, with a white strip in the forehead; the county had a common lumber two-horse wagon on the premises; defendant had a light grey horse, that was there a part of the time in 1856; it was said to belong to his wife; he sometimes drove it with one of his span of horses.

On his cross-examination, he testified: The wagon was not a light wagon; it was a wagon for heavy draughts; on the 10th or 11th of August, 1856, I was informed that a sleigh load of things had gone from the poor house to Geneva during the preceding winter; I went to the witness, *Daines*, and inquired of him if he had taken a load to Geneva; he stated that he had taken a couple of shoats that *Mrs. Coats* had leave to fatten, and some poultry, and that was all that he took; he said nothing about going to Geneva at any other time than this; I remarked to him that if there was any such thing going on I wanted to know it; I spoke to him a number of times about the affairs at the poor house; I generally made the inquiry of

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him whether matters were managed correctly about the poor house; he always replied that all things were managed right and honestly.

On his *re-examination*, he further testified: One of the conversations I had with Daines was in the presence of Mr. and Mrs. Coats; they all said they knew nothing wrong there.

Evidence was afterwards introduced on the part of the defence, tending to contradict Daines as to the number of hams kept in the garret at the time mentioned by him, and tending also to show that the smoke house at the poor house, where hams were kept, had been broken open in the spring or summer of 1856, and hams taken out.

Adam Clark, recalled by defendant, further testified: The defendant made a request to me for leave of absence, to go to Lockport in the forepart of the warm season in 1856; my recollection is that I granted him permission under certain provisions. In the agreement with defendant, his time was to be devoted first to the paupers, and whatever time was over he should devote to the farm; it was not expressed in the agreement that he should labor on the farm; Daines was employed to labor on the farm, and to use the team to haul provisions or anything of that kind.

Q. Did defendant, Coats, report to you the fact of the smoke house being broken open the first time you were there after it occurred?

To this question the District Attorney objected, on the ground that the evidence was improper, and the court so decided and sustained the objection; to which decision the counsel for defendant excepted.

I examined the smoke house, but I could not specify the time; my best recollection is, that it was the latter part of spring or forepart of summer; there were some appearances as if they had been trying to pry the door open; there were some dents in the jamb, and some in the door.

Q. Did you see enough to satisfy you that the attempts had been successful?

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To this question the District Attorney objected, on the ground that it called for the opinion of the witness. The court sustained the objection, and decided the question to be improper; to which decision the counsel for the defendant excepted.

My best recollection is, that the dents were a little below the staple, between that and the bottom of the door; the appearance of the marks could be made in different ways, by prying or throwing something against the door.

On his *cross-examination* he further testified: The conditions upon which I consented that defendant should go to Lockport were, that he should leave suitable persons in charge in his absence; I do not know of my own knowledge that he went; I was at the poor house in June; my best recollection is that defendant was there then; I do not recollect making a personal agreement with Daines; the defendant never reported to me that any hams were missing from the poor house, besides those taken from the smoke house; he said that hams were taken out of the smoke house when it was broken open; I do not recollect the number he stated; my best recollection is that it was somewhere from six to twelve.

It was proved, in the course of the trial, that Daines had been convicted of petit larceny on the 12th May, 1843, before a court of Special Sessions, and punished by imprisonment in the county jail.

Witnesses were introduced to impeach and to sustain the general character of Daines.

Evidence was also given for and against the general good character of the prisoner.

After the evidence was closed, the court charged the jury, among other things, as follows:

To warrant a verdict of guilty, several propositions must be affirmatively established by the People.

1st. It must appear from the proof that Adam Clark was Superintendent of the Poor of the county of Yates, at the time the crime is charged to have been committed, and that as

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such superintendent he was an incorporated company, within the meaning of the statute defining the offence.

2d. That the defendant was the agent of Adam Clark, as such superintendent being such incorporated company.

These two propositions involve questions of law which have heretofore been disposed of by this court, and are not to be submitted to you, except as qualified by the court; and that the defendant may have the full benefit of our ruling upon these points, we now advise and instruct you, as a matter of law, that Adam Clark, as Superintendent of the Poor, was an incorporated company within the meaning of the statute, and that if you shall be satisfied from the evidence that the defendant was the keeper of the poor house under Clark, the superintendent, during the year 1856, then he was the agent of an incorporated company, within the meaning of this statute.

The question whether Clark was such superintendent during this period of time, does not seem to be disputed. His testimony upon this point seems to fully sustain the proposition, and we apprehend you will have but little doubt or trouble in determining this question.

The next proposition to be affirmatively established by the People's proof, is this: Has the crime charged in the indictment been committed?

This is strictly the first proposition of fact to be found by you, and doubtless it will not be the laboring one in your minds. It is, however, for you to say whether, under the evidence, this crime has been committed. If you shall find in the affirmative of this proposition, then you will next inquire whether these hams came into the possession of the defendant by virtue of his employment as the agent of Clark, the superintendent.

If the defendant was the keeper of the poor house, and you shall so find, then all such provisions as were furnished by the superintendent for the maintenance of the paupers at the poor house, came into his possession, and in judgment of law were in his custody and under his control; but whether they were thus furnished, is a question of fact for your determina-

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tion. If, then, these hams were provided by the superintendent for this purpose, and thereby came into the possession of the defendant as keeper, the question arises, did he afterwards embezzle and convert them to his own use? This, gentlemen, is the real laboring question in the case. John Daines is the principal witness, and without his testimony no conviction can be had. His position was subordinate to that of the defendant; his labors were principally confined to the farm, and that seems to have been the object and purpose for which he was hired. You will remember the testimony upon this point. He says that he spoke to Mr. Clark, the superintendent, about working there, and that Mr. Clark referred him to the defendant, and said that if they agreed he could go to work, and that subsequently he did go to work there. In a legal aspect, I think we must regard the position and relation of Daines as subordinate to that of the defendant, the keeper. The defendant, occupying the position of keeper, had the authority to direct Daines as to his employment on the farm, and all directions given by him within the sphere of his duty, Daines, it would seem, was bound to obey. This seems to have been the manifest intention of the superintendent and keeper when they hired him.

We have said that Daines is the principal witness, and we now say that if he has testified truly, and you are satisfied that he has so testified, then we apprehend you will have but little difficulty in arriving at a satisfactory conclusion; and if, on the contrary, his statements are fabricated, or he is not entitled to credit, then your duty is very plain. You should render a verdict of not guilty.

It is claimed on the part of the defendant, that Daines is an accomplice, and standing in that relation he is not entitled to credit, and should not be believed, unless he is sustained by corroborating circumstances, proving or tending to prove the commission of the offence charged, and we are requested so to charge you. We are not so prepared to charge you, but propose to state to you such principles of law as we think applicable to this question.

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1st. If John Daines, when he brought those hams down from the garret (assuming that he did so), and put them in the wagon, and took them to Geneva, as stated by him, knew that the defendant was committing a crime, then he was a *particeps criminis*, and ought to be corroborated; but whether he had such knowledge or not, we shall submit to you as a question of fact. If you shall find from the evidence that he did not thus act, then he does not stand in such a relation, and does not require the corroboration stated.

We understand the rule of law, as to the testimony of accomplices, to be this, and we so give the law to you, that while a conviction may be had upon the uncorroborated testimony of an accomplice, if the jury are fully convinced of its truth, yet, at the same time, it is our duty to advise you that the testimony of a person standing in this relation should be received with great caution. Assuming that Daines stands in this relation, it is your duty to examine his testimony with the utmost caution, and unless you are fully convinced that he has been truthful and given a correct statement, you should not render a verdict of guilty.

We have been requested to charge you that the sale of the hams at Geneva, as testified to by the witnesses, Page and Teal, and the circumstances attending that sale, do not corroborate the witness, Daines, as to any material fact establishing or tending to establish the guilt of the defendant; but we feel it to be the safer course to say to you that we cannot so advise you; nor will we advise you that there are such corroborating circumstances as to go to sustain Daines, upon the assumption that he is an accomplice. We prefer to leave the credibility of Daines to you upon the whole case as it appears before you in evidence, with the suggestions we now make.

It is claimed, on the part of the District Attorney, that Daines drove the poor house team to Geneva, and this is a fact which the jury have the right to take into consideration. It must be borne in mind, however, that this is not conceded by the defendant. It becomes, therefore, a question of fact for you to say whether he did drive the poor house team or not.

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That he was there with a team, and that he sold hams there, cannot be nor has it been denied. Was it, then, the poor house team? If it was, could he have been absent with it for the length of time stated by him, and the defendant be ignorant of the fact? The defendant was the custodian of the poor house team and property. They were under his direction and control, and whether, assuming that it was the poor house team, the witness, Daines, could probably be absent as stated, without the knowledge of the defendant, is submitted to your consideration. The same is true of the hams. If they were taken from the poor house, were they so taken with or without the knowledge of the defendant? These questions will probably arise in your minds when you retire to your room for deliberation, and are proper to be considered in canvassing the question of the guilt or innocence of the accused.

It is claimed on the part of the prosecution, that Daines has been corroborated by the witness, Jackson. You will remember his testimony as to seeing hams in the garret the last days of May or the first of June. This is certainly a material point in this case, because, if there were no hams there at all during the time stated by Daines, then his story is a fabrication, and he is not entitled to credit; and whether or not there were hams there, it becomes very important for you to inquire. If Jackson is not mistaken as to this, then his testimony does corroborate Daines, in a material point, as to hams being in the garret. In this connection, however, you will consider the testimony of Mrs. Sarah Coats, Mrs. Simmons, Minor Coats, Charles Lawrence and Adam Clark. (The court here called the attention of the jury to the testimony of these witnesses.) We say, then, the testimony of these witnesses is important and material, and as honest and intelligent men you are to pass upon it.

It is claimed, on the part of the defendant's counsel, that Daines is not entitled to credit upon the whole case; that he has not only been contradicted by these witnesses as to the hams being in this room, and in other respects, but that he has been impeached by the testimony of witnesses upon the

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stand. You have heard the testimony of these witnesses as to the character of Daines, and the whole evidence is before you. You are the sole judges of credibility. * * *

We can only say, in conclusion, as we have stated before, this whole case hinges upon the testimony of John Daines. If he is to be believed, and you have no reasonable doubt as to the truth of his statements, then your duty, though painful, is plain; and if, on the contrary, you do not believe him, or if this testimony fails to convince your judgments of its truth, beyond a reasonable doubt, then your duty is equally plain—you should find a verdict of not guilty. The defendant, though indicted, stands before you with the presumption of innocence in his favor. This presumption must be overcome by proof, and this proof must be of such a character, and make such an impression on your minds, that you have, as we before stated, no reasonable doubt of his guilt. The defendant is entitled to and should have the benefit of all such doubts. The rule in this respect is different from what prevails in civil cases. In the latter, the jury may weigh the proofs, and may place their verdict upon the preponderating scale; but in criminal trials, where the benignity of the law presumes an accused party to be innocent until proved guilty, the evidence should generate a full belief of the facts charged to the exclusion of all reasonable doubt. It should establish the guilt so clearly, that a reasonable supposition of innocence would be wholly inconsistent with it.

The charge of the court being concluded, the counsel for the defendant, in the presence of the jury, took the following several specific exceptions thereto:

To so much of the charge as instructed and advised the jury "that Adam Clark, as Superintendent of the Poor, was an incorporated company within the meaning of the statute, and that if you shall be satisfied from the evidence that the defendant was the keeper of the poor house under Clark, the superintendent, during the year 1856, then he was the agent of an incorporated company, within the meaning of the statute."

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And to so much of the charge as instructed and advised the jury concerning the provisions furnished by the superintendent for the maintenance of the paupers, and the possession of the same by the keeper, in these words: "And in judgment of law, were in his custody and under his control."

And to so much of the charge as instructed and advised the jury concerning the same witness, Daines, that "in a legal aspect, I think we must regard the position and relation of Daines as subordinate to that of the defendant, the keeper."

And to so much of the charge as instructed and advised the jury in these words: "The defendant, occupying the position of keeper, had authority to direct Daines as to his employment on the farm, and all directions given by him, within the sphere of his duty, Daines, it would seem, was bound to obey."

And to so much of the charge as instructed and advised the jury in these words:

"1st. If John Daines, when he brought those hams down from the garret (assuming that he did so), and put them into the wagon, and took them to Geneva, as stated by him, knew that the defendant was committing a crime, then he was a *particeps criminis*, and ought to be corroborated; but whether he had such knowledge or not, we shall submit to you as a question of fact. If you shall find from the evidence that he did not thus act, then he does not stand in such a relation, and does not require the corroboration stated."

And to so much of the charge as instructed and advised the jury in these words: "We understand the rule of law as to the testimony of accomplices, to be this, and we so give the law to you, that while a conviction may be had upon the uncorroborated testimony of an accomplice, if the jury are fully convinced of its truth, yet, at the same time, it is our duty to advise you that the testimony of a person standing in this relation, should be received with great caution."

The defendant's counsel also requested the said court to charge the jury, amongst other things, as follows:

1. That there can be no conviction of an accused party merely upon the uncorroborated testimony of an accomplice.

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2. That the witness, John Daines, is, by his own admission and the proofs in the case, an accomplice in the offence charged.

3. That the witness, Daines, is not corroborated in any material point as to the commission by the defendant of the offence charged.

4. That the fact of being an accomplice is of itself an impeachment of the witness, Daines.

5. That no evidence of previous good character can restore the credit of an accomplice standing thus self-impeached.

6. That proof of previous good character of the accused is a sufficient defence in a doubtful case.

The court refused to charge the jury as requested, on each or either of them of the several propositions thus presented and as requested, to which several refusals of the said court, and each of them, so to charge as requested, the defendant's counsel specifically excepted.

The jury found the prisoner guilty of embezzlement, under the first count of the indictment, and not guilty as to the larceny charged in the second count.

The defendant, by his counsel, thereupon moved the said court in arrest of judgment, upon the following grounds:

I. The first count of the indictment is bad for duplicity.

1. Because it contains twenty-seven different and distinct articles which might be the subject of embezzlement, enumerated as having been embezzled, and, from their nature, impossible to have been embezzled at one and the same time; and

2. Because it contains different offences which, by statute, must receive different degrees of punishment.

II. The verdict is irregular, insufficient and uncertain.

1. Because it does not specify of which offence the defendant is convicted, nor the thing embezzled or its value; and

2. Because it does not acquit the defendant of those offences charged in the first count of which he is found guilty, or on which no verdict of guilty is found.

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The motion in arrest of judgment was denied by the court, to which the prisoner's counsel excepted.

The prisoner was sentenced to be imprisoned in the State Prison, at hard labor, for two years.

A bill of exceptions having been settled, the cause was removed by writ of error to this court.

The cause was argued by

D. J. Sunderlin, for the plaintiff in error, and

H. M. Stewart (District Attorney), for the People.

The Supreme Court, after advisement, decided that no error had been committed, and affirmed the judgment of the Court of Sessions.

Judgment affirmed.

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A

AFFIDAVIT.

See NEW TRIAL.

AFFRAY.

In a case of a mere affray or beating with fists, it cannot be necessary for a third person to resort to fire-arms or take life, in any case, for the purpose of protecting one combatant from being injured by the other. *The People v. Cole.* 35

ARREST.

1. It is no ground, either for quashing an indictment or discharging the prisoner from arrest, that before the finding of the indictment, and after the issuing to the officer, by a police justice, of a warrant for his arrest, by an agreement between the officer and some person in Canada, the prisoner was forcibly brought from Canada to the line of this State, and there delivered to such officer, in arrest, under the warrant. *The People v. Rose.* 253

ARSON.

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ASSAULT.

See ASSAULT WITH INTENT TO KILL.

ASSAULT WITH INTENT TO KILL.

1. A verdict by which the prisoner is found "guilty of an assault and battery with intent to kill," without reference to a sufficient indictment, and without specifying the means by which the assault and battery were committed, will authorize no sentence for any offence beyond a simple assault and battery. *The People v. Davis,* 61
2. An assault and battery with intent to kill, is not a felony by our statute or at the common law, unless com-

mitted with a deadly weapon, or by such other means or force as are likely to produce death. *O'Leary v. The People*, 187

3. Where, in an indictment, the first two counts charged the prisoner with having committed an assault and battery with a deadly weapon with intent to kill one M. C., and the third count charged an assault and battery upon the said M. C., with intent to maim her, and, on the trial, the jury found the prisoner "guilty of the crime of assault and battery with intent to kill," and the court thereupon sentenced the prisoner to imprisonment for two years in the State prison, the judgment was reversed on the ground that, on the verdict rendered, the court was only authorized to punish for a simple assault and battery. *id*

4. And the case having been brought from the Court of Sessions to the Supreme Court, by writ of error, it was held that the latter court had not the power to order a new trial in the court below, but that the judgment of reversal was final. *ib*

5. Form of an indictment for assault and battery committed with a deadly weapon, with intent to kill, with a count charging an intent to maim. *ib*

ATTACHMENT.

1. It is not error for the court to refuse to issue an attachment against a witness, on the application of the prisoner's counsel, after such counsel has stated that they have no other witnesses, and arrangements have been made for summing up the cause on both sides, and assented to by the court. The open-

ing of the testimony in that stage of the case, rests in the discretion of the court. *Stephens v. The People*, 896

AUTREFOIS CONVICT.

1. To an indictment for rape, the prisoner pleaded that he had been convicted before W. B., a justice of the peace, on the oath of the prosecutrix, E. R. J., of an assault and battery upon her, and fined twenty dollars, which fine was paid by him, and that the assault and battery of which he was so convicted, was the same assaulting, beating, ravishing and carnally knowing of the said E. R. J., charged in the indictment for rape. On demurrer to such plea, it was adjudged bad, on the ground that the facts set forth in it constituted no defence to the indictment for rape. *The People v. Saunders*, 196

2. An acquittal upon an indictment for a felony, constitutes no bar to an indictment for a misdemeanor; and an acquittal for a misdemeanor is no bar to an indictment for a felony. *ib*

3. To make the plea of *autrefois convict* or *autrefois acquit* a bar, it is necessary that the crime charged in both cases be precisely the same; and in considering the identity of the offences, it must appear by the plea that the offence charged in both cases was the same, in law and in fact. *ib*

4. This case does not come within the provision of the Revised Statutes, which makes an acquittal or conviction, on a former trial for an offence, a bar to an indictment for

such offence in any other degree, or for an attempt to commit such offence. ib

5. Where, in a case of felony, a plea of *autrefois acquit* or *autrefois convict* is interposed and overruled, there should be judgment of *respondeas ouster*. ib

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B

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See RECOGNIZANCE.

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3. On an application to bail, after indictment, depositions taken before the committing magistrate cannot be looked into. ib
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1. The offence of burglary consists of breaking and entering with intent to steal or commit any felony, and the commission of the crime, of which the intent is charged, is not the only evidence by which such intent may be proved. It may be shown by some other fact or circumstance, or by some act or declaration of the prisoner. *People v. Marks*, 153
2. Where, in an indictment for burglary with intent to commit larceny, and for the commission of such larceny, the larceny itself is insufficiently charged, the prisoner may still be convicted of the burglary alone, if the evidence is sufficient to establish the intent charged. ib
3. On the trial of an indictment for burglary, it is erroneous for the court to charge the jury that the prosecution is not bound to prove the intent affirmatively, though the intent need not be proved by direct or positive evidence; yet the prosecution must affirmatively show facts or circumstances from which it may be inferred. ib
4. An indictment for burglary, charging the breaking into a store in which goods are kept for use, sale and deposit, is not sustained by evidence of breaking into an inner room of a building, which was not a store, but a mere business office of the Board of Underwriters, in which were kept merely furniture and articles for their business use. ib

C

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1. Forms of writ of *certiorari* to review, before the general term proceedings on *habeas corpus*, before judge at Chambers, of affidavit on which it was allowed, and of return thereon. *The People v. McCormack*, 9
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3. Form of *certiorari*, after writ of error with a return thereto. *O'Leary v. The People*, 187
4. Form of a writ of *certiorari* to the Oyer and Terminer, to bring up certain papers not constituting a part of the judgment record. *Stephens v. The People*, 396

CHALLENGE OF JURORS.

1. To sustain a challenge for *principal cause*, on the ground that the juror has formed and expressed an opinion, it must appear that the opinion was absolute, unconditional, definite and settled; it is not enough that it was hypothetical, conditional, indefinite and uncertain. If the opinion belong to the latter class, it is a proper subject for a challenge to the favor. *Stout v. The People*, 71
2. Where, on a trial for murder, a juror who was drawn was challenged by the prisoner for principal cause, on the ground that he had formed and expressed an opinion,

and such challenge was traversed by the public prosecutor, and it appeared by the testimony of the juror, who was called upon as a witness to prove the truth of the challenge, that he thought he had an impression as to the prisoner's guilt or innocence; that he rather thought he had formed an opinion; that he presumed he had expressed it, and thought he retained it; that he had formed an opinion, if the newspaper accounts of the transaction, of which he had read only a part, were true, and that so far as he read he gave them credence; that it might or might not require evidence to remove his impression of the prisoner's guilt; that he had not arrived at any definite opinion, and the court overruled the challenge, and decided the juror to be competent, it was held on review that the decision was correct. *ib*

3. In all challenges for principal cause and for favor, the matter of fact upon which the challenge is founded, must be specified when the challenge is interposed, or the court should disregard it. Such matter of fact may be traversed, presenting a question of fact for decision, or the party may demur, thus admitting the truth of the allegation. *ib*
4. It is most convenient for the dispatch of business, and in accordance with the customary practice at the Circuit and Oyer and Terminer, that a challenge for principal cause, resting upon a disputed question of fact, should be decided by the court, though such a question may, like a challenge for favor, be referred to triers for determination; and when such a question has been determined by the court, without objection from either party, the court will be deemed to have acted

by the consent of counsel on both sides, and its right thus to act cannot afterwards be questioned. Per SMITH, J. *ib*

5. A question of fact on a principal challenge, in the absence of consent to a different mode of trial, is properly triable before triers appointed by the court. It is competent, however, for the parties, by consent, to waive the appointment of triers, and submit to the court the question of fact for its decision; and such has become the general practice. *Stout v. The People*. 182

6. The determination of the court, on a question of fact thus submitted, cannot be excepted to, and is final. It stands in that respect upon the same footing as if it had been made by triers, and cannot be reviewed on error. *ib*

7. Mere hypothetical opinions, though legal evidence to be considered on a challenge for favor, will not sustain a challenge for principal cause. *ib*

1. On the trial of a challenge for favor, the person challenged as a juror testified that he "had read part of the statements in the papers at the time of the homicide, and had formed a preconceived idea in regard to the prisoner's guilt or innocence; that he had no bias one way or the other; that his preconceived idea or impression would in no way influence his verdict, but would be governed entirely by the evidence produced on the stand." He was adjudged to be a competent juror. *Sanchez v. The People*, 535

CHARACTER.

See EVIDENCE.

COMMITMENT.

A warrant of commitment is irregular in not stating or showing on its face that the justice issuing it had determined that there was probable cause to believe the prisoner guilty of the offence with which he stood charged. *The People v. Rhoner*, 166

CORONER'S INQUEST.

1. After an inquest, *super visum corporis*, has been held by a coroner, in case of sudden or violent death, and an inquisition has been found by the jury, a second inquest cannot be held by the coroner, unless the first inquisition shall have been vacated or set aside, or shall have been absolutely void. *The People v. Budge*, 519

2. Where, on a coroner's inquest, the jury found that the death was caused by suicide, and nearly four months afterwards the coroner summoned another jury, and held a second inquest, at which the jury found that the deceased was killed by H. B., whereupon the coroner issued a warrant of commitment, under which he was imprisoned, on *habeas corpus* the accused was discharged from imprisonment, on the ground that the second inquisition was not authorized by the statute. *ib*

COURT OF SESSIONS.

1. Where a person was indicted in a Court of Sessions for rape, with but

one count in the indictment, in the usual form, and the Court of Sessions directed a *nolle prosequi* to be entered for the crime of rape, and the prisoner was tried for an assault only, and convicted, the conviction was reversed, and the prisoner discharged. *The People v. Porter*, 524

D

DEMURRER.

See INDICTMENT.

DISORDERLY HOUSE:

1. It is no objection to an indictment for keeping a disorderly house, that it is charged in the same count that it is kept as a bawdy house, a tippling house and a dancing house. It is not necessary, under such a count, to prove that all of such offences were committed, but the defendant should be convicted, if it is shown that either was permitted in such a manner and under such circumstances as to make the house disorderly and a nuisance. *The People v. Carey*, 238

DISORDERLY PERSON.

1. On a complaint against a person as a disorderly person, for neglecting to support his wife, evidence showing that the parties had, for many years, lived as husband and wife is competent to prove the marriage. *The People v. McCormack*, 9

E

EMBEZZLEMENT.

1. Where the keeper of a county poor house, employed for that purpose by the Superintendent of the Poor of the county, and holding under him, secretly sold and converted to his own use articles of food provided for the support of the county poor house: *Held*, that he was guilty of embezzlement within the statute (R. S., 678), and could be convicted of that offence under an indictment charging that the articles embezzled were the property of such Superintendent of the Poor. *Coats v. The People*, 62

2. Counts for embezzlement and larceny may be joined in the same indictment. 15

3. It is no objection to a count for embezzlement, that it charges the embezzling of several different articles, some of them of more and some of them of less value than \$5 each. 5

EVIDENCE.

1. On a complaint against a person as a disorderly person, for neglecting to support his wife, evidence showing that the parties had, for many years, lived as husband and wife, is competent to prove the marriage. *The People v. McCormack*, 9

2. Character is important in a criminal case where it is doubtful, upon the evidence, whether the prisoner committed the act, and where a jury have a right to weigh the probabilities; its bearing is more re-

mote where the act is clearly proved, and where the question is, with what intention and at what suggestions the act was done. *The People v. Cole*, 85

3. On a trial for felony, it is not a valid objection to evidence by the prosecution of a fact otherwise competent, that it would tend to prove the prisoner guilty of a distinct and different felony. *Stout v. The People*, 71

4. The prisoner and his sister, Mrs. L., were indicted for the murder of L. On the separate trial of the prisoner, evidence was given tending strongly to show that the prisoner and Mrs. L. were both present at the homicide, and that it was the result of a violent struggle, in which all three were in some way engaged; that the deceased had been jealous of his wife; that they had lived unhappily together, and had quarrelled, and had partially separated; and that she had applied to an attorney to procure a divorce from her husband. The prosecution then offered evidence tending to show an incestuous connection between the prisoner and Mrs. L. during the few months immediately preceding the homicide: *Held*, that such evidence was competent on the question of motive. 5b

5. On the trial of an indictment for murder, evidence on the part of the prosecution of a fact tending to prove a motive for the commission of the homicide, ought to be received, although the fact thus offered to be proved, amount itself to a distinct felony. *Stout v. The People*, 132

6. An indictment charging the opening of a letter which had been in the custody of a mail-carrier before
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it had been delivered to the to whom it was directed, with sign to obstruct the correspondence of another, &c., is not sustaint proof that the defendant opened a letter which had been left with at his residence by the mail, and which was directed to a person to the care of the defendant at the number of the house, opened by the defendant, it appears that the defendant not only used artifice to obtain possession of the letter, but that he in fact objected receiving it: *Held*, also, that being no evidence of the correctness of the indictment, except the confessions of the defendant, the defendant ought to be acquitted on that ground. *States v. Mulvaney*,

7. It is competent to ask a witness on his cross-examination, in view to affect his credibility, affirmatively answered, whether he had not been guilty of adultery and had a venereal disease since marriage. If the facts thus required into are wholly collateral to the issue in the case, the witness may refuse to answer such questions, and no inference unfavorable to the character of such witness be drawn from such refusal. *People v. Blakely*,

8. Where the prisoner was tried on the charge of having forged the name of W. B. to a note and tract, dated 16th or 17th of 1855, and it appeared that at dates W. B. was confined to his bed by sickness, and that he died on 20th of that month, and that he given up all hopes of recovery early as the 18th of the same month, it was held to be competent for the prisoner to prove, that on the 16th of that month, W. B. stated to the witness that he had signed the note and tract in question.

9. On the trial of an indictment for uttering counterfeit bills or notes, it is not competent for the prosecution to prove the subsequent uttering by the prisoner of other forged bills or notes, unless it be shown that they were of the same manufacture as those charged in the indictment, or are in some way connected with the offense charged. *Dibble v. The People*, 199
10. Where, on the trial of an indictment for obtaining money by false pretences, it appeared that certain bills purporting to have been issued by a foreign bank, had been transferred upon certain representations alleged to be false, and the material questions to be decided were, whether there was any such bank in existence, and whether it was solvent, it was held not to be competent to prove by a broker that, in his opinion, bills of that description never had any value, the broker not having shown any knowledge on the subject, except that he had been for twelve years a money broker, had bought and sold bank bills, and in April or May previous, had been offered and had refused to take bills of the description in question. *The People v. Chandler*, 231
11. Evidence of a confession made by a party should not be excluded in a criminal case, on the sole ground that it was made while under arrest. Such confession should be received, if it was voluntary, not made under the influence of fear or hope, or under an excitement or agitation of mind, which would probably affect its verity, nor drawn out by the act or conduct of the person to whom it was made. *Hartung v. The People*, 319
12. There is no precise standard fixing the degree of knowledge which a witness must possess of a person's handwriting to be allowed to express an opinion as to the authenticity of a particular paper. If the witness has seen the party write, and acquired a knowledge, more or less perfect, of the character of the hand, he is allowed to express an opinion.
13. On the trial of an indictment for murder by poisoning, after opinion, adverse to the theory of the prosecution, had been testified to by a physician, with reference to the appearances on a *post-mortem* examination, and the time indicated by them when the poison was introduced into the stomach, an experienced chemist, who had made the *post-mortem* examination, was asked by the prosecution the following: "In your opinion can a physician, from a mere *post-mortem* examination of the exterior surface, and the indications of inflammation which he discovers, determine with any degree of certainty the precise period of time when such inflammation was caused?" and the question was objected to on the part of the prisoner as being "immaterial, improper and incompetent." It was held, that the question was competent; that the objection raised no question as to the form of the interrogatory, but merely as to the substance; and that the ground of the objection, as stated, presented no question whether an opinion was competent on the subject, nor whether the witness was one of the class of persons who were qualified to express an opinion, because such grounds of objection were not specifically stated.
14. Also held, that the subject matter of the question was one upon which

thorized, the jury found that the deceased was killed by the prisoner. *The People v. Budge*, 519

5. On return to a writ of *habeas corpus*, issued to inquire into the cause of detention, after commitment by a magistrate, and before indictment, additional proof may be received by the judge for the purpose of enabling him to decide upon the legality of the detention. *The People v. Richardson*, 656

HOMICIDAL MANIA.

See EVIDENCE.

I

INDICTMENT.

1. In an indictment under the first section of chap. 109, of the Laws of 1854, entitled "An act for the protection of Gas Light Companies," it is not sufficient to charge the act complained of in the words of the statute. *The People v. Wilber*, 19

2. The relations of the party, whom it is alleged the defendant intended to defraud, to the means by which the fraud is sought to be perpetrated, must be alleged, so that the court can judicially see that the act complained of is calculated, as well as intended, to defraud; and where an indictment alleged, in the words of the statute, that the defendant connected certain pipes, &c., &c., with intent to defraud a gas company, and contained no allegation that the company supplied the gas

consumed at the burners: *Held* that the indictment was defective. *Id*

3. Whether the bare mention of the name of a gas company in an indictment, necessarily implies an allegation of its corporate existence, *quere*. *Id*

4. The general rules of pleading, and the exceptions thereto, as applicable to an indictment under this statute, and what such an indictment should contain, discussed and stated. *Id*

5. It is no objection to an indictment for selling spirituous liquors without license, to be drank on the premises of the person selling, against the provisions of the act of April, 18, 1857, that the act is charged to have been done "without having obtained a license therefor as a tavern keeper, or without being in any way authorized to sell the same as aforesaid." *The People v. Gilmison*, 26

6. The use of "or," instead of "and," is fatal in an indictment only where it renders the statement of the offence uncertain. *Id*

7. If one count in an indictment be good, it will sustain a judgment, though the other counts be defective. *Id*

8. Where, in an indictment for selling liquors without license, the acts were charged to have been committed "on the first day of August, 1857, and on divers other days and times between that day and the day of finding the indictment, to wit; the first day of July, 1857," and the count was demurred to on the ground that the offence was thus alleged to have been committed

- after the finding of the indictment, it was held that all the *continuando* might be rejected, and the demurrer was overruled. 3b
9. Form of an indictment for selling spirituous liquors without license, against the provisions of the act of April 16, 1857. 3b
10. Where, in an indictment for obtaining an indorsement to a note by false pretences, the note was set forth at length, and it thus appeared to have been made by the defendant and payable to the order of the prosecutor, and there was no averment that the indorsement was made for the accommodation of the defendant, it was held that the indictment was defective for want of such averment, the presumption being on the face of the note alone, that it was the property of the prosecutor at the time of the indorsement. *The People v. Chapman*, 56
11. This case distinguished from *Fenton v. The People* (4 Hill, 126). 3b
12. An indictment charging an assault and battery with "an intent to kill," without also charging that the assault and battery were committed with a deadly weapon, or by such other means or force as were likely to produce death, will not warrant a conviction for any offence higher than assault and battery. *The People v. Davis*, 61
13. A verdict by which the prisoner is found "guilty of an assault and battery with intent to kill," without reference to a sufficient indictment, and without specifying the means by which the assault and battery were committed, will authorize no sentence for any offence beyond a simple assault and battery. 3b
14. Where a court, in an indictment against the mayor, aldermen and councilmen of the city of New York, charged that the defendants "did violate and evade the provisions" of such amended charter, "by voting for and passing a resolution in due form, directing the comptroller to lease" certain real estate of the corporation to the Roman Catholic Orphan Asylum, for more than ten years, the count was adjudged bad, as not charging any offence under the statute passed in 1857, ch. 446. *People v. Wood*, 144
15. Where, in an indictment for burglary, with intent to commit a larceny, the larceny itself is insufficiently charged, the prisoner may still be convicted of the burglary alone, if the evidence is sufficient to establish the intent charged. *The People v. Marks*, 153
16. Form of an indictment in the United States Court for opening a letter, which had been in the custody of a mail carrier, before it was delivered to the person to whom it was directed. *United States v. Mulvaney*, 164
17. Form of an indictment for an assault and battery committed with a deadly weapon, with intent to kill, with a count charging intent to maim. *O'Leary v. The People*, 167
18. Receiving on storage for hire, or purchasing grain by false weights, in the business of a warehouseman and merchant, was a misdemeanor at common law; the offence being now made a felony by statute, the misdemeanor is merged in the felony. *The People v. Fish*, 206

18. In such a case an indictment is bad on demurrer, which does not charge defendant's acts and intents to have been *felonious*. *ib*
19. It is also bad where it charges the intent to deceive and defraud "divers citizens of the State," but omits to name them, or to aver that they were to the jurors unknown. *ib*
20. Whether it is necessary that the caption of the indictment should state that "the jurors were sworn, &c., for the People of the State of New York and the body of the county of (Erie)" instead of "for the body of the county of (Erie)," merely.—*Quere* *ib*
21. Form of demurrer book, on demurrer to indictment. *ib*
22. It is no objection to an indictment that it was found while an investigation of the charge was pending before the committing magistrate. *The People v. Horton*, 222
23. In an indictment against a constable for not executing a warrant, it is necessary to show by averments that the justice who issued the warrant had jurisdiction. *The People v. Weston*, 226
24. It is not sufficient that the warrant set forth in the indictment, recites all the facts necessary to confer the authority to issue it. It must be alleged in the indictment that those facts are true. *ib*
25. In pleading the judgments and proceedings of inferior courts of special and limited jurisdiction, a general averment of jurisdiction is not sufficient, but the facts on which it depends must be averred. *ib*
26. It is no objection to an indictment for keeping a disorderly house, that it is charged in the same count that it is kept as a bawdy house, a tippling house and a dancing house. *The People v. Carey*, 238
27. In an indictment for uttering and circulating as money foreign bank bills, and for receiving such bills with intent to circulate them, contrary to the provisions of section 2 of the act of May 7, 1839, as amended April 13, 1853, it is not sufficient to describe the defendants as officers of a bank or banking association, and then simply to charge that they did the acts complained of. It is necessary to allege a violation of the statute by the bank or association, and that the defendants acted as such officers in doing the acts in question. As individuals, the defendants are not liable, unless they are "authorized to carry on the business of banking in this State," and where the intent is to charge them as such, the allegation bringing them within section 2 of the act of 1853 should be made in the indictment. *The People v. Williams*, 249
28. Form of an indictment for murder by poisoning, against M. H. as principal, and W. R. as accessory before the fact, with counts at common law and under the statute. *The People v. Hartung*, 256
29. In an indictment for murder, it was charged "that the said M. S. a certain knife, which he, the said M. S., in his right hand then and there had and held, him, the said J. L., in and upon the forehead, then and there willfully and feloniously and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said J. L., then and there, *with the knife aforesaid*, in and upon the

- forehead of him, the said J. L., one mortal wound," &c., &c. It was held, on error, that the clerical omission of the word "with," before the words "a certain knife," did not vitiate the indictment, the offence being sufficiently charged in other clauses of the indictment. *Shay v. The People*, 353
30. Where, on demurrer to an indictment for larceny in stealing a dog, it was stipulated that the indictment should be considered as alleging that the dog in question had been reclaimed and made tame and domestic, and that the defendant, knowing it to be such, feloniously took and carried it away: *Held*, that the stipulation should be disregarded in deciding the demurrer. *The People v. Campbell*, 386
31. Form of an indictment for the statutory offence of seduction under promise of marriage. *Grant v. The People*, 527
32. In an indictment for murder, it was charged that the mortal wound was given by stabbing with a sword "in and upon the body" of the deceased: *Held*, sufficient, without specifying the part of the body upon which the wound was inflicted. *Sanchez v. The People*, 535
33. Where the indictment alleged that the deceased was killed by "one mortal wound," and the proof showed that two were given, the variance was held to be immaterial. *ib*
34. Form of an indictment for arson in the first degree. *Didieu v. The People*, 593
35. Under an indictment for arson in the first degree, the defendant may be convicted of arson in the third degree, where the offence proved on the trial is the burning of goods, wares, merchandise or other chattels, insured against loss or damage by fire, with intent to prejudice the insurer. *ib*
36. The application to such a case of the statutory provision (2 R. S., 762, § 25), which allows a conviction for any degree of the offence inferior to that charged in the indictment, is not a violation of the sixth section of the State Constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentation or indictment of a grand jury." *ib*
37. Form of an indictment against husband and wife for the embezzlement and larceny of property charged to belong to A. C., as Superintendent of the Poor of the county. *Coats v. The People*, 662

See ARREST.

NOLLE PROSEQUI.

J

JURISDICTION.

1. In an indictment against a constable for not executing a warrant delivered to him against a person charged with crime, it is necessary to show by averments that the justice who issued the warrant had jurisdiction. *The People v. Weston*, 226
2. It is not sufficient that the warrant set forth in the indictment recites all the facts necessary to confer the

authority to issue it. It must be alleged in the indictment that those facts are true. *ib*

3. In pleading the judgments and proceedings of inferior courts of special and limited jurisdiction, a general averment of jurisdiction is not sufficient, but the facts on which it depends should be averred. *ib*

4. Cattle, stolen in Wyoming county, were driven across the line into Erie county, and through different towns of the latter county into the city of Buffalo: *Held*, that the Superior Court of Buffalo had jurisdiction for the trial of the offence. *The People v. Smith*, 255

5. The court cannot acquire jurisdiction to try an offence by consent, nor can the averment in an indictment be charged by consent, so as to embrace any other than those presented by the grand jury. *The People v. Campbell*, 386

See HABEAS CORPUS.

JURY.

1. Where a case rests upon circumstances, it is for the jury to construe them and to say whether they necessarily impute guilt to the defendant, or whether they are consistent with his innocence. *Pfomer v. The People*, 558
2. After the impanneling of a jury in a criminal case, its arbitrary discharge, without any cause, and where no circumstances exist calling for the exercise of the discretion of the court, is a bar to a subsequent trial

of the defendant upon the same indictment. *Grant v. The People*, 527

See MURDER.
RAPE.
VENUE.

L

LARCENY.

1. Where, on a trial for larceny, it appeared that the property stolen had not come to the possession of the prisoner, but had been received by C. on the order of the prisoner, and there was evidence tending to prove that C. was a confederate with the prisoner in the transaction, but C. testified to his entire innocence, and the judge charged the jury that they were to determine whether C. was an innocent agent of the prisoner in taking the property, and that if they so found, and found also a felonious intent on the part of the prisoner, they should find him guilty, but that if they should come to the conclusion that C. had a knowledge of the prisoner's felonious intent, then they should find the prisoner not guilty, on the ground that he was in that case only an accessory before the fact: *Held*, on review, that the charge was correct. *The People v. McMurray*, 234
2. A simple receipt is not the subject of larceny under the statute; otherwise of an "accountable receipt." *ib*
3. A note, though payable in specific articles, is the subject of larceny within the statutory definition. *The People v. Bradley*, 245

4. A dog, though property, so as to enable the owner to maintain an action of trespass for an unlawful taking, was not the subject of larceny at the common law; but under the provisions of the statute declaring all personal property the subject of larceny, an indictment for stealing a dog will now be sustained in this State. *The People v. Campbell*, 386

See JURISDICTION.

EMBEZZLEMENT.

M

MANSLAUGHTER.

1. If life be unnecessarily taken by a third person interfering between combatants, for the purpose of preserving the peace, in protecting one against the other, the offence is manslaughter. *The People v. Cole*, 35

MARRIAGE.

See EVIDENCE.

MURDER.

1. To justify the taking of life in self-defence, it is necessary that the prisoner himself should have been attacked; that he should have had reasonable ground to suppose that the object of the attack was to kill him or to do him great bodily harm; that he should have been unable to withdraw himself from such imminent danger, and therefore should

have been compelled to kill his assailant to protect himself against his attack. *The People v. Cole*, 35

2. A person is not responsible for a mistake which he makes in self-defence, in supposing a deadly design which does not exist. But he must be actually assailed, and he must show reasonable ground for supposing that his only recourse was to kill his assailant. *ib*
3. To a certain extent a person must be his own judge in such a case; but if he act honestly and upon reasonable ground, he will not be held accountable for a mistake made under such excitement, and in great apparent personal danger to himself. *ib*
4. Where the prisoner justifies on the ground that the act was committed "necessarily in lawfully keeping and preserving the peace," as where he interferes to prevent A.'s taking the life of B., and to that end kills A., he must show, to establish a defence, not that he had reasonable ground to believe the act necessary, but that it was actually necessary, and that he had no other way to prevent the commission of a felony. *ib*
5. In a case of a mere affray or beating with fists, it cannot be necessary for a third person to resort to firearms, or take life in any case, for the purpose of protecting one combatant from being injured by the other. *ib*
6. If life be unnecessarily taken by a third person interfering between two combatants, for the purpose of preserving the peace, in protecting one against the other, the offence is manslaughter. *ib*

7. On the trial of an indictment for murder, evidence on the part of the prosecution of a fact tending to prove a motive for the commission of the homicide, ought to be received, although the fact thus offered to be proved, amounts itself to a distinct felony. *Stout v. The People*, 132
8. Form of an indictment for murder by poisoning, against M. H., as principal, and W. R., as accessory before the fact, with counts at common law and under the statute. *The People v. Hartung*, 256
9. Circumstantial evidences of guilt on trial of an indictment for murder by poisoning. *ib*
10. Appearances of stomach and intestines, on *post mortem* examination, in case of poisoning, described, with opinions of scientific men on the subject. *ib*
11. Charge of the presiding judge on a trial at the Oyer and Terminer, in a case of alleged murder by poisoning. *ib*
12. It is a reprehensible irregularity for a jury, after they have retired to deliberate on a trial for murder, to take the opinions of the constable in attendance, on the question whether the jury could bring in a verdict of manslaughter, and to send for the Revised Statutes and examine their provisions in relation to the crimes of murder and manslaughter. *ib*
13. Such an irregularity is sufficient to vitiate a verdict of "guilty," unless it appears beyond all reasonable doubt that no injury has resulted from it to the prisoner. *ib*
14. The evidence of jurors is not to be allowed for the purpose of impeach-
ing or in any way impairing the effect of their verdict. *ib*
15. *It seems*, there is no rule which prevents the constable, sworn to attend the jury, from being present in the jury room during the deliberations and discussions of the jury, though the practice is disapproved. *ib*

MISDEMEANOR.

1. Giving a lease of real estate belonging to the corporation of the city of New York, for a longer period than ten years, or without having complied with the provisions of the 41st section of the amendment to the charter of the city of New York, passed in 1857 (*ch. 446*), is the violation of such charter within the meaning of the 40th section of said act, and punishable as a misdemeanor. *People v. Wood*, 144
2. The mayor, aldermen and councilmen of the city of New York are officers of the city government within the meaning of the said 40th section, and, as such, are liable to indictment for willfully doing the acts forbidden by that section, and which are therein declared to be misdemeanors. *ib*
3. A conspiracy by such officers to give a lease in violation of the provisions of such charter, is a misdemeanor; but it is not a misdemeanor, under the said 40th section, for such officers to vote for and pass a resolution directing the comptroller of the city to lease real estate of the corporation for a longer term than ten years, such voting of itself not being an unlawful act, and the statute providing that no aldermen or councilmen shall be questioned

in any other place for any speech or vote in either board. *ib*

4. Where a count in an indictment against the mayor, aldermen and councilmen of the city of New York, charged that the defendants "did violate and evade the provisions" of said amended charter, "by voting for and passing a resolution in due form, directing the comptroller to lease" certain real estate of the corporation to the Roman Catholic Orphan Asylum for more than ten years, the count was adjudged bad as not charging any offence under the statute. *ib*

5. The non-payment by the collector of assessments of the city of New York, to the chamberlain of said city, within the time required by the ordinances of the common council, of the money collected by him on tax warrants issued by the city authorities, is not a "fraud upon the city" within the meaning of section 40 of the amended charter of said city, passed April 14, 1857, by which the committing of a fraud upon the city is declared to be a misdemeanor. *People v. Taylor*, 158

6. The conducting of a house in such a way as to disturb and disquiet the neighbors, or the carrying on of its business so as to tend to the corruption of public morals, is punishable as a nuisance. *The People v. Carey*, 238

7. On a motion for a new trial made before the Oyer and Terminer, after a conviction for murder, on the ground that the verdict was against evidence, the following facts appeared: The deceased and one Smith were quarrelling, when the prisoner interfered and struck the deceased the first blow on the

head; the blow was returned by the deceased, who then retreated, followed by the prisoner. The prisoner secretly opened his knife, whereupon the deceased again struck at the prisoner, and again retreated. The deceased then struck the prisoner with the knife, and cut him in the face. The deceased continued to flee, and the prisoner was approaching the deceased, when Kirby run in between them. The prisoner then struck at Kirby with the knife, but the latter jumped out of the way, and the prisoner followed the deceased. One of the brothers of the deceased called out to him to take care or he would be killed, and as the deceased looked around to see his danger, the prisoner struck the knife into his temple with such force, that after three unsuccessful attempts to draw it out, he fled, leaving the knife sticking in the head of the deceased. The death of the deceased was caused by the last blow. It was held that these facts were sufficient to warrant the conclusion that the prisoner had formed the determination to take the life of the deceased before he struck the last blow, and a new trial was denied. *The People v. Shay*, 344

8. Form of a judgment record on a conviction for murder, including an indictment for murder by poisoning. *Stephens v. The People*, 396

9. On a trial for murder, it is competent for the court, without the consent either of the People or the prisoner, to permit a separation of the jury during the progress of the trial. *ib*

10. The objection that the judgment record does not show the prisoner to have been present in court during the whole of the trial, nor at the

- rendition of the verdict, is not available on error when it appears by the record that he was personally present at the impanelling of the jury and when the judgment was rendered, and when the return of the minutes of the court, made to a writ of *certiorari*, show that the jurors were polled on giving their verdict, and that the prisoner was present on every day of the trial previous to the rendering of the verdict. b
11. It is competent to ask a physician, on his cross-examination, to give his opinion whether certain symptoms, particularly specified, were those of arsenical poisoning, when the witness has previously given testimony in relation to the same subject matter, and where the symptoms inquired about are the same of which evidence had been previously given by another witness. b
12. An anonymous letter, proved to have been written by the prisoner and sent to S. C., reflecting upon the character of S. B., a young lady of whom S. C. was the suitor, was held admissible in evidence against the prisoner, on a question of motive, on a trial for murder of the prisoner's wife by poisoning, it being charged, and there being circumstances tending strongly to show that the object of the prisoner in committing the alleged murder, was to enable him to marry S. B. b
13. Symptoms of poisoning by arsenic, and of the appearances on *post-mortem* examination in cases of death by poison, as described by witnesses and proved by eminent physicians and chemists. b
14. Circumstantial evidences of guilt on a trial for murder by poisoning with arsenic. b
15. Charge to the jury of Mr. Justice Roosevelt, on the trial before the Court of Oyer and Terminer. b
16. The following propositions, charged by the judge on the trial, were affirmed by the court:
1. The counsel for the prosecution having read to the medical witnesses certain symptoms from a paper marked by the judge, and inquired their opinion as to the cause of death in a case where such symptoms existed, if the jury believe that the symptoms of which Mrs. S. (the person alleged to have been poisoned), complained in her lifetime, are not in all respects the symptoms stated in the paper read to the physicians, that then the medical opinions are not admissible as competent evidence to be weighed by the jury, and cannot be taken into consideration.
 2. If the jury are of opinion that the body of Mrs. S., after being exhumed for analysis, was so exposed that access could be had to it by other parties than those who made the *post-mortem* examination of the body and conducted the chemical analysis, under such circumstances that they could have applied arsenic to it, and particularly if they believe that R. B., one of the witnesses for the prosecution, who first charged the prisoner with poisoning his wife, actually had access to the body and tampered with it, so much of the analysis as was made after the body was so exposed and tampered with, is not competent evidence against the prisoner, and should be disregarded by the jury.
 3. Where a prisoner is charged with the commission of a crime, and evidence of good character is introduced by him, which is not controverted on the part of the

People, such evidence is to be considered by the jury, and is not merely of value in doubtful cases, but will of itself sometimes create a doubt when, without it, none could exist; and if good character be proved to the satisfaction of the jury, it should produce an acquittal, even in cases where the whole evidence slightly preponderated against the accused.

4. When a charge depends upon circumstantial evidence, it ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.

5. If the jury, upon considering the whole of the evidence, have a reasonable doubt of the guilt of the defendant of the offence charged in the indictment, it is their duty to acquit.

6. If the jury believe that R. B. attempted to assassinate the prisoner before his arrest upon the charge of poisoning his wife, and that he entertained feelings of animosity and hatred towards him, and if the jury believe that S. and F. B. are also hostile towards the prisoner, and have quarrelled with him, that then they should consider these matters in weighing the degree of credit which is to be given to their testimony. 2b

17. The statute declaring a homicide to be excusable "when committed upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner," is not applicable to a case where the deceased was killed by the prisoner in a fight with fists, and in which the fight was arranged by the prisoner or his friends with his adversary some hours before the fight took place. *The People v. Tamm*, 514

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18. Where, in an indictment for murder, it was charged that the death was caused by beating and striking, and the evidence showed that it was probably caused by injuries to the side of the deceased, occasioned by his falling upon a mound of earth when engaged in a personal combat with the prisoner, the prisoner was acquitted by the jury under the advice of the court. 2b

19. Where, on a trial for murder, the court, in charging the jury, submitted to them to decide whether the prisoner was guilty of murder or manslaughter, or whether the act in question was justifiable homicide, and after an absence of twenty-four hours, the jury, not having agreed, returned into court and asked for further instructions on the law, when the court further charged the jury that if they believed the witnesses, the case was clearly within one of the degrees of manslaughter, and it was for the jury to say which degree, such further charge was held to be erroneous, as withdrawing from the jury the decision of questions of fact. *Pfomer v. The People*, 558

20. In such a case it is purely a question of fact for the jury to determine whether the prisoner, at the time he slew the deceased, had reasonable ground to believe his own life to be in danger from the deceased. 2b

21. On a trial for murder, where the death occurred in a personal encounter, and the defence is that the killing was justifiable, on the ground that the prisoner, at the time he slew the deceased, had reasonable ground to believe his own life to be in danger, whether it is competent for the prisoner to prove the violent and ruffianly character and habits of the deceased, and whether such character

and habits must be brought to the knowledge of the prisoner, discussed by counsel, with a full collection of the American authorities on these questions. *ib*

22. To constitute the offence of murder under the first subdivision of the fifth section of the statute, entitled "Of crimes punishable with death" (2 R. S., 657), an actual intention to kill must in all cases be proved. Without such an intention, the act can be no more than manslaughter. *Wilson v. The People*, 619

23. Such intention may be inferred from the circumstances under which the violence was inflicted, and sometimes from the act itself; but the onus of establishing it rests upon the prosecution. *ib*

24. The "heat of passion" mentioned in the statutory definition of manslaughter, affords the intended protection to the accused, whether it was produced by acts or words, if the provocation was such as was naturally calculated to produce it. *ib*

25. Sentence of the prisoner on a conviction for murder. *ib*

See EVIDENCE.

INDICTMENT.

NEW TRIAL.

N

NEW TRIAL.

1. It is very questionable whether surprise, founded on a mistake in law, can be a ground for a new

trial. It cannot be where it arose solely from the negligence of the moving party. *The People v. O'Brien*, 203

2. Where the defendant had been convicted of keeping a disorderly house, and on motion for a new trial, it appeared from his affidavits that the conviction was had solely upon evidence that his tenant of the basement kept that part of the house in a disorderly manner; that he, the defendant, occupied the floor above, and supposing he was only required to defend, as he did, the character of the part occupied by himself, and the affidavits did not show that he had, but left the inference that he had not, disclosed all the facts to his counsel, and did not show that he had discovered any material evidence not before known to him and within his reach: *Held*, that he was not entitled to a new trial. *ib*

3. It seems that the Superior Court of Buffalo has power to grant a new trial to a defendant convicted of a misdemeanor, either on the judge's minutes at the same term at which he was convicted, or on a case at the general term. *ib*

4. On a motion before the Court of Oyer and Terminer, in behalf of the prisoner, for a new trial, on the ground of irregularity, affidavits of counsel, as to information they have received from jurors concerning what took place in the jury room, cannot be received as any evidence of the alleged irregularity. *Wilson v. The People*, 619

5. It is no reason for setting aside a conviction for murder, on motion for a new trial, that during a recess of the trial, one of the jurors took up and examined a piece of the skull of the person alleged to have

been murdered, which was lying on the District Attorney's table, the circumstances of the case being such as to show that the juror could not have been misled thereby, and the fact of the juror having examined the said skull being known to the prisoner's counsel before they entered upon the defence. *ib*

6. Affidavits of jurors cannot be received to show that, at the request of one of their number, a constable handed in a paper, on which were marked the several punishments fixed by law for the different degrees of manslaughter. *ib*
7. And when such fact was shown by the affidavit of the constable, the court refused to set aside the verdict, it appearing affirmatively that the jury could not have been misled thereby. *ib*

See MURDER.

NOLLE PROSEQUI.

1. A Court of Sessions has no power to direct a *nolle prosequi* to be entered on an indictment pending therein for an offence not triable in that court. *The People v. Porter*, 524
2. Nor can a *nolle prosequi* be entered to a part of a count of an indictment, though the court in which it is pending have jurisdiction to try the offence charged. A *nolle prosequi* may be entered to the whole of an indictment, or to any one or more of several counts in an indictment. *ib*

See COURT OF SESSIONS.

NON-RESIDENT.

See PRACTICE.

O

OPENING OF LETT.

See EVIDENCE.

P

PERJURY.

1. Perjury cannot be assigned as a defence to a protest taken by a notary public, as part of the necessary proofs in case of a loss. The oath in such a voluntary and extra-judicial proceeding. *The People v. Travis*

PILOTAGE.

1. A pilot, within the meaning of chap. 69 of the Laws of 1847 relating to Hellgate pilots, is one who is piloting and directing the vessel while on board of it. It is no defence against the act, for a pilot of a steam tug to take a vessel through Hellgate, lashe side of the steam tug, if the steam tug remains on his own steamer, and maintains to those on board the vessel to change their helm to conform to the movements of the vessel. *Francisco v. The People*,
2. It is erroneous, in such a case, to charge, that in so towing a schooner through Hellgate, the steam tug was committed to the act of pilotage.
3. Steamboats have a right to pass through Hellgate being subject to the law n

pilotage, being excepted from its operation by the 10th section of the act of 1847. *ib*

PLACE OF TRIAL.

See VENUE.

PLEADING.

See AUTREFOIS CONVICT.
INDICTMENT.

POSTPONEMENT OF TRIAL.

See PRACTICE.

PRACTICE.

1. It is no objection to an indictment that it was found while an investigation of the charge was pending before the committing magistrate.
People v. Horton, 222
2. There is no rule of practice making it imperative, in criminal cases, to put over the trial, upon affidavits of a prescribed form and substance. *ib*
3. Where an application is made by a defendant, in a criminal case, to postpone the trial, strict practice requires the prisoner to make in his affidavits a full disclosure of the names of his witnesses, and the facts he expects to prove by them, though such strictness may well be waived by the District Attorney or by the court, on an application made at the term when the indictment is found; and where there is no appearance of ill faith, the court ought to grant a reasonable oppor-

tunity to supply defects and omissions in the affidavits before the decision upon the application. *ib*

4. The postponement of the trial of an indictment, on the application of the prisoner, is in no case a matter of legal right, but rests upon the discretion of the court. In resisting such a motion, the District Attorney may state facts touching the merits of the application; and the demeanor and conduct and conversation of the prisoner in the presence of the court, may properly be taken into consideration, and the minutes of the grand jury may be referred to for the purpose of ascertaining the materiality of the matters proposed to be proved by the absent witnesses. *ib*

5. In deciding upon such an application, the same credence cannot be given to the affidavit of a person indicted for felony, as to the uncontradicted affidavit of a party to a civil action. *ib*

6. An order for taking the testimony of a non-resident complainant *de bene esse*, under the acts of 1844 and 1846, entitled in the "Court of General Sessions," before the finding of an indictment thereon or the offence, is irregular, and testimony taken under it cannot be read in evidence on the trial of the indictment. *The People v. Ward*, 516

See VENUE.

PRIVILEGED COMMUNICATION.

1. A communication made to an attorney at law, by a person seeking professional advice or assistance to

enable him to forge a contract, is not privileged, and the attorney, when called as a witness, can be required to disclose it. *People v. Blakley*, 176

Q

QUASHING INDICTMENT.

1. An indictment for embezzlement and larceny was found against W. S. C. and M. C., his wife, and, on motion, in behalf of M. C., the court quashed the indictment as to her: *Held*, that quashing the indictment as to M. C. did not discharge it, and was no reason for quashing it as to W. S. C., but that he could be tried under the indictment as if originally indicted alone. *Coats v. The People*, 662
2. It is no reason for quashing an indictment for the embezzlement and larceny of articles of food provided for the support of a county poor house, that they are charged in the indictment as the property of the Superintendent of the Poor of the county. *ib*

See ARREST.

R

RAPE.

See COURT OF SESSIONS.

RECOGNIZANCE.

1. Where a prisoner is let to bail by an officer out of court, the recogni-

zance taken must be filed, as required by statute, before any action can be taken upon it by the court; and no suit can be maintained upon such a recognizance, without averring in the complaint and proving on the trial that it had been filed, or made a record of the court in which it was returnable. *The People v. Shaver*, 45

2. It is a good defence to an action on a recognizance, that it was taken on an illegal arrest of the prisoner, for whom the defendant became bail. *ib*
3. A complaint in writing charging S. with bigamy, alleged to have been committed in Albany county, was made before a justice of the peace of Fulton county, who issued his warrant for the arrest of S., under which S. was arrested in Montgomery county, by a constable of the latter county (the warrant not having been first indorsed by a justice of Montgomery county), and brought into the county of Fulton before the justice who had issued the warrant, upon whose requirement a recognizance was entered into to appear at the next Court of Sessions to be held in Montgomery county: *Held*, that the arrest was illegal, and the recognizance void for duress; that it should have been directed to an officer of the county in which the justice who issued it was a magistrate; and that the justice who issued the warrant had no authority, in a case like that before him, to take a recognizance for the appearance of the prisoner at a Court of Sessions of any other county than that in which the justice resided. *ib*

4. Form of a complaint on recognizance, and of an answer thereto,

setting up the above mentioned defence. 5b

REVERSAL OF JUDGMENT.

1. On reversing a judgment of the Oyer and Terminer, by which the prisoner was sentenced to imprisonment in the State Prison, and ordering a new trial therein, the Supreme Court further ordered that the prisoner should appear at the next Court of Oyer and Terminer, to be held in the county in which he had been convicted, to stand trial on the indictment, and not depart the court without its leave, and abide its orders and judgment. *People v. Blakely*, 176

S

SELF-DEFENCE.

See MURDER.

T

TRIAL.

See VENUE.

V

VAGRANCY.

1. Satisfactory evidence that a female is "a common prostitute and idle person," will not authorize her conviction as a vagrant under the statute. *The People v. Forbes*, 611
2. "Common prostitutes" and "idle persons" are not necessarily vagrants: it is only "common prosti-

tutes who have no lawful employment whereby to maintain themselves," and "idle persons who, not having any visible means to maintain themselves, live without employment," that come within the vagrancy acts. 5b

3. These acts are constitutional, but should be construed strictly and executed carefully in favor of the liberty of the citizen. 5b

4. Where a person is committed as a vagrant, the record and commitment should set forth the grounds on which the charge of vagrancy was based. 5b

5. Where a conviction of vagrancy before a police justice is reviewed on *habeas corpus* before a judge at chambers, the only inquiry should be, whether the justice had jurisdiction of the prisoner, and whether the prisoner was committed for an offence within the statute. *The People v. Gray*, 616

6. The offence consists in being a vagrant; and it is not necessary that the record or the commitment should state the grounds on which the charge of vagrancy was based. It is enough that they show that the prisoner had been charged with being a vagrant, and was convicted of that offence. 5b

VENUE.

1. That a fair and impartial trial, by any means within the reach of the law, cannot be had in the county in which the venue was laid, is a sufficient reason for changing the place of trial in a criminal case. *The People v. Long Island Railroad Company*, 602
2. In deciding upon such an application, the court should be governed by

the facts shown, and not by the mere impressions or conclusions of parties and witnesses. *ib*

3. It is not indispensable to a change of venue in a criminal case, that there should have been an ineffectual attempt to obtain a jury in the county where the venue was laid. *ib*

W

WARRANT.

See JURISDICTION.

WITNESS.

1. Conviction of petit larceny does not render the person convicted incompetent to testify as a witness, within the provision 2 R. S., 701. *Shay v. The People,* 858

WRIT OF ERROR.

1. A writ of error to review in the Court of Appeals a judgment rendered in the Supreme Court, on an indictment for a capital offence, can not be issued unless allowed by a Judge of the Court of Appeals, or Justice of the Supreme Court, or a County Judge, and such writ of

error will not stay or delay the execution of such judgment, or of the sentence thereon, unless it be expressly directed in the allowance that the writ shall operate as a stay of proceedings. *Stout v. The People,* 132

2. Such writ ought not to be allowed and the proceedings stayed; unless it is probable an error has been committed, or unless real doubt may well be entertained as to the correctness of the decisions sought to be reviewed. *ib*

3. The return to a writ of error in a criminal case, brings up the indictment, the pleas interposed by the defendant, and the trial and judgment upon those pleas, as well as the bill of exceptions. On such a return, therefore, a special plea of a former trial on the same indictment, and the proceedings on such plea are properly before the court for review. *Grant v. The People,* 627

4. An order quashing a conviction and sentence, is not reviewable on writ of error under the act of 22d March, 1852. That act is only applicable to judgments. *The People v. Barry,* 657

5. Form of a writ of error, sued out by the defendant, to remove a cause, after conviction, from the Court of Sessions to the Supreme Court, with the allowance of the same and stay of proceedings on the sentence. *Coats v. The People,* 662

Ex. C. 10. 11.

